Supreme Court, U. S.
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In the Supreme Court of the United States

October Term, 1977

No. 77-382

FRANK BEAL, SECRETARY, DEPARTMENT OF PUBLIC WELFARE, COMMONWEALTH OF PENNSYLVANIA, et al.,

Petitioners

v.

ELVIRA VECCHIONE, et al.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE SUPREME COURT
OF THE UNITED STATES

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v.

ELVIRA VECCHIONE, et al.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Frank Beal, et al., Petitioners, hereby petition that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit which was entered in this case on June 14, 1977.

I. OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, is set out at 139a-160a. The District Court's opinion is reported at 426 F. Supp. 1297, and is set out at 97a-138a.

II. JURISDICTION

The judgment of the Court of Appeals was entered on June 14, 1977, and the jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254 (1).

III. QUESTIONS PRESENTED

This petition raises the questions of whether an order requiring the state defendants to refund millions of dollars wrongfully collected and deposited in the Commonwealth's treasury violates the Eleventh Amendment to the Constitution of the United States. If that order is found to be unconstitutional, then the question of whether Pennsylvania has waived her immunity arises. The Court of Appeals in the first instance found that the Eleventh Amendment was not a bar to the District Court's order. That Court also went on to hold that, even if the Eleventh Amendment did apply, it had been waived by Pennsylvania's failure to appeal from the order. Therefore, the following questions are presented by this petition:

1. Whether the award of restitution in this case violated the Eleventh Amendment to the Constitution?

2. Whether Pennsylvania by moving to vacate that order in timely fashion, rather than appealing, has waived its Eleventh Amendment immunity?

IV. STATEMENT OF THE CASE

Respondents, recipients of OASDI Social Security benefits, commenced this civil rights action in January 1973. They challenged the constitutionality of two sections of Pennsylvania's Mental Health and Mental Retardation Act which allowed Commonwealth officials to apply for and receive federal benefits for patients residing in Pennsylvania mental health and retardation facilities.[1] In the main, they claimed a due process right to a judicial determination of incompetence before the Petitioners could apply for, and receive, these benefits on Respondents' behalf. They also contended that this statutory scheme violated the equal protection clause in that Respondents were not provided the various procedural protections that, under Pennsylvania law, were provided to others.

Because Respondents sought injunctive relief from the operation of these statutes, a three-judge court was convened. On June 11, 1974, that court enjoined the continued implementation of those statutes, finding that they were unconstitutional on due process and equal protection grounds (68a-69a).

On March 13, 1975, the Respondents moved for a finding of contempt, asserting that Petitioners continued

[1] Mental Health and Mental Retardation Act of 1966, 50 Pa. Stat. Ann. §4401 et seq. The sections which were challenged by Respondents have been set out in full at 161a.

to assess patients for care and maintenance costs in violation of the injunction. That motion was settled by the entry of a subsequent order, with the consent of counsel, which, inter alia, required the restitution of approximately $9 million to thousands of residents of Pennsylvania's mental facilities.

On February 18, 1976, the Petitioners moved to vacate the restitution aspects of that subsequent order on Eleventh Amendment grounds.[2] The District Court refused to vacate the order and was affirmed in this respect by the Court of Appeals (159a-160a). Petitioners therefore seek review of the Appeals Court's decision.

[2] That order was entered on April 4, 1975 and is set out at 77a.

V. REASONS FOR GRANTING THE WRIT

A. The Lower Court's Holding That the Eleventh Amendment Is Not Applicable in This Case Is Erroneous and Contrary to This Court's Ruling in Edelman v. Jordan

For approximately nine months after the entry of the original injunction in this matter the Petitioners continued to act as representative payees for thousands of mental patients receiving federal benefits. In that capacity they continued to apply certain portions of these funds toward the cost of the patients' care and maintenance at the various facilities.[3] As a result, the District Court ordered restitution with interest (77a-79a).

In refusing to vacate this award on Eleventh Amendment grounds, both the District Court and the Court of

[3] Federal law defines the responsibilities of representative payees and places the highest priority on payment of a patient's care and maintenance expenses. 42 U.S.C. §405(j), 20 C.F.R. §404.1601 et seq. These funds, however, were collected by Pennsylvania revenue agents subsequent to the July 11 order, and in apparent violation of that order. The funds, of course, served to partially offset the costs of a patient's care and maintenance. 72 Pa. Stat. Ann. §206. Furthermore, state law requires that

> "[a]ll moneys received by the Department of Revenue during any day shall be transmitted promptly to the Treasury Department . . ." 72 Pa. Stat. Ann. §209.

Thus, the funds so collected were promptly deposited with Pennsylvania's Treasury.

Appeals ignored the teaching of this Court in *Edelman v. Jordan*, 415 U.S. 65 (1975). In *Edelman* this Court noted the earmarks of an unconstitutional award against a state. First, such an award ". . . to a virtual certainty [must be] paid from state funds, and not from the pockets of the individual state officials who were defendants in the action." *Id.* at 668. Next, the amount of the award is ". . . measured in terms of a monetary loss resulting from a past breach of a legal duty on the part of the defendant state official." *Ibid.*

There can be no serious doubt that both of these characteristics are present here. First, the Court of Appeals conceded that the order could not be complied with ". . . unless the Commonwealth fiscal authorities cooperated . . ." (156a). In short, the award could only be paid from the state treasury. Secondly, the order specifically measured the payback as ". . . all such amounts withheld . . . including interest earned" (78a-79a).

The lower Court ignored these obvious and critical similarities to the decree which was set aside in *Edelman*. Rather, the Court of Appeals chose to extend the *Ex Parte Young*[4] fiction beyond all precedent, noting simply that "[w]here the money came from to comply with the restitution ordered in paragraph 4 of the order was [petitioners'] problem, not the court's" (150a-151a). If the *Ex Parte Young* doctrine is to be extended to the point that a multi-million dollar award against a state's treasury can be entered by a federal court, notwithstanding the clear limitations of that doctrine in *Edelman*, then such an extension should come from this Court. See *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459 (1945); *Jagnan-*

[4] 209 U.S. 123 (1908).

dan v. Giles, 538 F.2d 1166 (5th Cir., 1976); *McAuliffe v. Carlson,* 386 F. Supp. 1245 (D. Conn., 1975), *rev'd on other grounds,* 540 F.2d 305 (2d Cir., 1976), *cert. den.* 96 S.Ct. 3199 (1976).

B. The Court of Appeals' Ruling That Pennsylvania Had Waived Its Eleventh Amendment Immunity Directly Conflicts With the Holding of the Court of Appeals for the Sixth Circuit in Jordan v. Gilligan [5]

The District Court's order requiring restitution of approximately $9 million was never appealed. However, when it was discovered that its terms violated the Commonwealth's Eleventh Amendment immunity, the Petitioners moved, in timely fashion, to vacate the order pursuant to F.R.C.P. 60(b).[6] The Court of Appeals affirmed the District Court's denial of that motion, concluding that Pennsylvania had waived its immunity by not appealing from the original order.

That decision by the Court of Appeals has created a direct split among the circuits on this issue. In a strikingly similar case, the Court of Appeals for the Sixth Circuit has concluded that, like other jurisdictional questions,[7] the Eleventh Amendment may be raised by a motion to vacate a final judgment pursuant to F.R.C.P. 60(b). *Jordan v. Gilligan,* supra. In *Jordan,* the Court of Appeals was presented with an appeal from a denial of a motion to vacate a judgment awarding attorney's fees against the State of Ohio. Ohio, like Petitioners in this case, asserted that the award was void since it violated the Eleventh Amendment and that, therefore, the District Court had been without jurisdiction to enter it. Similarly, the District Court in *Jordan* had denied the motion because the State of Ohio failed to object to the award until after the judgment became final. *Id.* at 710.

However, the Sixth Circuit reversed, ruling that ". . . once it is determined that a state is not subject to federal jurisdiction because of the operation of the Eleventh Amendment, a court must vacate any judgment entered in excess of its jurisdiction." *Ibid.*

In this case the lower Court expressly disagreed. Contrary to the Sixth Circuit, the Third Circuit concluded that an order which exceeds a Court's jurisdiction under the Eleventh Amendment is not void and can only be challenged by appeal. In this regard the lower Court acknowledged that ". . . we disagree with the holding in *Jordan v. Gilligan,* 500 F.2d 701 (6th Cir., 1974), that a claim of sovereign immunity can be raised by a Rule 60 (b) (4) motion at any time." (157a).

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[5] 500 F.2d 701 (6th Cir., 1974), *cert. den.* 421 U.S. 991 (1975).

[6] In Pennsylvania only the Legislature can waive the Commonwealth's immunity. *Freach v. Commonwealth of Pennsylvania,* —— Pa. ——, 370 A.2d 1163 (1977); *Collins v. Commonwealth of Pennsylvania,* 262 Pa. 572, 106 A.2d 229 (1919); *Ford Motor Co. v. Department of Treasury,* 323 U.S. 459 (1945); *Sosna v. Iowa,* 419 U.S. 393, 396, n.2 (1975).

[7] E.g., *Veek v. Commodity Enterprises, Inc.,* 487 F.2d 423 (9th Cir., 1973); *In re Penco Corp.,* 465 F.2d 693 (4th Cir., 1972); *Misco-Leasing, Inc. v. Vaughn,* 450 F.2d 257 (10th Cir., 1971); *Sagers v. Yellow Freight Systems, Inc.,* 68 F.R.D. 686 (N.D. Ga. 1975); *Sonus v. Matsushita Electric Industrial Co. Ltd.,* 61 F.R.D. 644 (D. Mass., 1974); *U.S. v. Melichor,* 56 F.R.D. 49 (E.D. Wisc., 1972).

The split between the circuits on this important issue is obvious. It is a question of great importance to the Commonwealth of Pennsylvania, as well as to all other states, as they are continually confronted with attacks, both direct and indirect, upon their public fisc by private litigants.

VI. CONCLUSION

For the foregoing reasons Petitioners respectfully request that this Court grant the petition for writ of certiorari to review the judgment of the Court of Appeals for the Third Circuit in this case.

Respectfully submitted,

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APPENDIX

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

1. DOCKET ENTRIES

VECCHIONE v. WOHLGEMUTH, et al.
CA-73-162

Date	Proceedings
1973	
1	Jan. 9, Plff's Motion for leave to proceed in forma pauperis, and Affidavit of Plff. in support thereof, filed.
(1)	Jan. 19, Order granting Plffs' Motion to proceed in Forma Pauperis, filed. EB 1/19/73 entered and copies mailed.
2	Jan. 19, Complaint, filed.
	Jan. 19, Summons exit.
3	Feb. 2, Summons returned, "on 1/24/73 served Dept. of Public Welfare", "on 1/23/73 served Philadelphia State Hospital at Byberry", filed.
4	Feb. 12, Deft's motion to dismiss Plff's complaint memorandum of law & affidavit of service, filed.
5	Feb. 20, Plff. motion for a temporary restraining order & notice thereof, filed.
6	Feb. 20, Plff. motion for a three judge court & notice thereof, filed.

7 Feb. 20, Plff. memorandum in support of plff motion for temporary restraining order, three judge court & for class action & exhibits, filed.

8 Feb. 20, Plff. motion for class action & notice thereof, filed.

9 Feb. 21, Supplemental memorandum in support of plff motion for temporary restraining order, three judge court, & for class action & in opposition to deft motion to dismiss, filed.

10 Feb. 26, Letter dtd. 2/22/73 to Judge Becker from Marx S. Leopold, Esq. Re: Withdrawal of any opposition to plff's Motion for Three-Judge Court, filed.

11 March 1, Order that Hon. Arlen M. Adams U. S. Circuit Judge & Hon. E. Mac Troutman are designated to sit with Hon. Edward Becker for determination of this case, filed. 3-1-73 entered & copies mailed.

12 March 2, Stipulation & Order that provisions of the stipulation are entered of record etc., Judges Adams & Troutman concur in this Order, filed. EB

13 July 30, Order that Hon. James Hunter, III is hereby appointed to replace Hon. Arlin M. Adams, filed. 7/31/73 Entered and copy mailed.

14 Aug. 6, Dfts' assent to motion of plff. for class action, filed.

15 Aug. 10, Order that counsel file with the Clerk of the Court copies of all pleadings & legal memoranda heretofore filed, and all subsequent pleadings for distribution to Hon. James Hunter, III and Hon. E. Mac Troutman, filed. EB 8/13/73 Entered and copies mailed.

16 Sept. 4, Stipulation and Order that stipulations of facts be entered of record as findings of the Court, filed. EB 9/5/73 Entered and copies mailed.

17 Sept. 14, Plff's motion for Summary Judgment upon stipulated facts & Statement of stipulated facts in support of plff's motion for Summary Judgment, filed.

18 Sept. 14, Brief in support of plff's motion for summary judgment upon stipulated facts, filed.

Oct. 4, Hearing on Motion to Dismiss by Dft and Motion for Summary Judgment by Plff. C.A

1974

19 May 10, Partial transcript of hearing of 10-4-73 re: defts' motion to dismiss and plffs' motion for summary judgment, filed.

20 July 11, Opinion and Order, Becker J., wherein it is ordered, adjudged and decreed that §424 of the Mental Health and Mental Retardation Act of 1966, 50 P.S. §4424 is Unconstitutional on its face and as applied in violation of the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the extent that it denies plff *et al* adequate notice/opportunity to be heard before taking control of these patients assets, etc.; defts are enjoined from applying said sections in the unconstitutional manner set forth above; that Commonwealth shall restore to plff money taken by Commonwealth when plff was hospitalized at the Phila. State Hospital at Bayberry, filed. 7-12-74 Entered & notice/copies mailed.

21 July 12, Order with Amendment to Opinion so that line 4, page 3 reads ". . . as to all persons who are

not adjudged incompetent, . . ." filed. 7-15-74 Entered & copies mailed.

1975

22 Feb. 7, Motion of Walter Burgess to intervene, notice, certificate of service and memorandum of law in support, filed.

23 Mar. 10, Plff's motion to hold deft in contempt of court, notice, certificate of service and memorandum of law in support, filed.

24 Mar. 11, Affidavits of Dallas Washington and Robert Sprout in support of Burgess' motion to intervene with certificate of service, filed.

25 Mar. 13, Plffs' amended motion for contempt of court and Order fixing 4/4/75 in Courtroom 14 at 10:00 A.M. for hearing re same, filed. 3/14/75 entered and copies mailed.

26 Mar. 25, Affidavit of Joseph Breslin in support of motion for intervention and certificate of service, filed.

27 Apr. 1, Plff's motion for preliminary injunction and affidavit in support, filed.

28 Apr. 2, Supplemental memorandum in support of motion of Burgess to intervene, filed. (certificate of service)

29 Apr. 4, Order that motion of plffs for comtempt is marked "withdrawn" and application of plff-intervenor Buress for preliminary injunction is marked "withdrawn", filed . 4/7/75 entered and copies mailed.

30 Apr. 4, Stipulation and order that the regulations attached shall be fully adopted by the deft Beal on behalf of DPW, etc., and granting Buress' motion to intervene etc., filed.

31 Apr. 22, Certification re compliance of Frank Beal with Court order of 4/4/75, filed.

32 June 5, Copies of collections from Guardian Accounts in State Hospitals, filed.

33 June 12, Appearance of Herbert Newberg as counsel for intervenor plff Buress, filed.

34 June 12, Motion of Buress to amend Paragraph r of order of 4/4/75 to include an allowance of counsel fees and costs from the fund created and certificate of service, filed.

35 Jun. 16, Plff/intervenor's (Buress) motion for contempt, further relief and leave for discovery and certificate of service, filed.

36 Jul. 10, Defts' petition for extension of time to comply with paragraph 4 of Court Order of 4/4/75, etc., filed.

37 Jul. 10, Defts' petition for clarification re full hearing on the merits of the issue, whether or not the funds distributed by Federal Agencies to DPW are within the ambit of the decision and orders of Court, etc., filed.

38 Jul. 11, Plffs' interrogatories to defts and Marx Leopold and certificate of service, filed.

39 Jul. 11, Plffs' notice of depositions of Frank Beal et al and certificate of service, filed.

40 Jul. 11, Plff Buress' motion for direct contempt and appointment of Master and response to defts' petitions for extension of time and clarification, and certificate of service, filed.

41 Aug. 1, Affidavit of Clifford McGill in support of plff's motion for direct contempt and appointment of master, filed.

42 Aug. 12, Intervenor-plff's brief in support of motion for reasonable counsel fee and certificate of service, filed.

43 Aug. 12, Affidavit of David Ferleger, Esq., filed.

44 Aug. 12, Affidavit of Jonathan M. Stein, Esq. relating to intervenor-plff's motion for counsel fees, filed.

Sept. 8, Settlement Conference, Becker, J.

45 Sept. 9, Report of pretrial conference, filed.

Nov. 13, Pretrial Conference, Becker, J.

46 Nov. 14, Report of pretrial conference, filed.

47 Dec. 22, Plff's motion for attorneys fees, notice and certification, filed.

48 Dec. 22, Plff's memorandum of law in support of motion, filed.

1976

49 Jan. 9, Defts' memorandum of law in opposition to plff's motion for attorneys' fees and certificate of service, filed.

50 Feb. 5, Plff-Intervenors motion for a class action & Memorandum of law in support thereof, filed.

51 Feb. 5, Motion of Charles Funk and Ruth Somogyi to intervene, memorandum in support thereof, filed.

52 Feb. 5, Motion of Plff-intervenor Ruth Somogyi and Charles Funk for contempt memorandum in support thereof, filed.

53 Feb. 6, Plff's motion for temporary restraining Order and preliminary injunction, certificate of service, filed.

54 Feb. 9, Plffs' memorandum on power of single judge to conduct contempt and other implementation proceedings and certificate of service, filed.

55 Feb. 10, Petition of Ruth Somogyi and Charles Funk for leave to proceed in forma pauperis with affidavits in support, filed.

56 Feb. 12, Defts' motion to vacate and/or modify consent decree, notice and memorandum of law in support thereof, filed.

57 Feb. 13, Plff's analysis of 12-12-75 pay back data and certificate of service, filed.

58 Feb. 13, Plff's supplemental memorandum of law, filed.

59 Feb. 13, Defts' memorandum of law, filed.

60 Feb. 13, Plffs' certificate of service on 2-6-76 of the Temporary Restraining Order, etc., filed.

61 Feb. 19, Memorandum of plffs and plff-intervenors on proposals by all parties for imterim order, with attached proposed orders, filed.

(51) Feb. 20, Order that motion for leave to intervene after hearing is Denied etc., filed. EB 2-23-76 entered and copies mailed.

62 Feb. 20, Request of Clifford McGill for the production of records and documents by the herein named defts, etc., and certificate of service, filed.

63 Mar. 3, Defts' objections to request of Clifford McGill for Production of Records and Documents, filed.

64 Mar. 9, Stipulation and Order that defts. shall give plff's counsel and the Court at least 24 hrs. advance notice prior to the transfer of or the drawing upon of any funds transferred from the general appropriation of the Dept. of Public Welfare which still remain in interest bearing Renenue Agent Guardian accounts, filed.

65 Mar. 29, Plff's memorandum in opposition to defts' motion to vacate and/or modify, filed.

66 Apr. 2, Plff's certificate of service re plff's memorandum in opposition defts' motion to vacate and/or modify, etc., filed.

67 Apr. 20, Reply memorandum of law in support of defts' motion to vacate and/or modify and certificate of service, filed.

68 Apr. 26, Plff's reply memorandum in opposition to defts' motion to vacate and or modify, filed.

69 May 26, Interim Order, etc., filed. EB 5-27-76 entered and copies mailed.

70 May 26, Second Interim Order, etc., filed. EB 5-27-76 entered and copies mailed.

71 Jun. 18, Plffs' motion for contempt and certificate of service, filed.

72 Jun. 23, Defts' response to motion for contempt, affidavit and certificate of service, filed.

73 Jun. 30, Defts' motion for extension of time in which to complete and report the results of sample, etc. notice thereof, filed.

74 Jul. 16, Stipulation and Order that the time in which a random sample of preliminary opinions shall be redone, and the time in which the resulting information shall be provided to plffs and the Court shall be extended to 8-2-76, etc., filed. EB

75 Jul. 16, Stipulation and Order that be agreeing on the procedures by which a random sample of preliminary opinions is to be redone pursuant to paragraph 15 of this Court's Second Intermin Order of May 26, 1976, no party has waived or in any way prejudiced his of her rights to challenge on any basis the results of the resulting random sample, etc., filed.

76 Sep. 20, Commonwealth defts' notice of deposition of Marx S. Leopold and certificate of service, filed.

77 Sep. 20, Commonwealth defts' notice of deposition of Cecil Maidman and certificate of service, filed.

78 Sep. 29, Deposition of Cecil Maidman, filed.

79 Sep. 29, Deposition of Donald D. Dougherty, filed.

80 Sep. 29, Deposition of Ellwood Shoemaker, filed.

81 Sep. 29, Deposition of Marx S. Leopold, Esq., filed.

82 Sep. 29, Deposition of Donald J. Murphy, filed.

83 Sep. 29, Deposition of John Greecher, filed.

84 Sep. 29, Deposition of Raymond Foote, filed.

85 Oct. 1, Three Judge Court Hearing—on 9-30-76—Motion to vacate or modify Consent Decree—CAV, filed. EB, JH MT

86 Oct. 1, Factual stipulations, filed.

87 Oct. 5, Deposition of Peter W. Brown, filed.

88 Oct. 8, Order that defts' motion to vacate and/or modify the Consent Decree is Denied, etc., filed. EB 10-12-76 entered and copies mailed.

89 Oct. 15, Transcript of testimony of 9-30-76, filed.

90 Oct. 19, Plff's Bill of Costs, notice thereof and certification of counsel, filed.

91 Nov. 4, Plffs' position with regard to matters at issue in defts' proposed stipulation regarding class members' funds and discharge to other facilities and certificate of service, filed.

92 Nov. 4, Stipulation and Order re" Disbursements, etc., filed.

93 Nov. 4, Deft's notice of appeal, filed.

94 Nov. 4, Copy of Clerk's Notice of Appeal to USCA, filed.

95 Nov. 10, Deft's motion for stay, memorandum of law in support and certificate of service, filed.

96 Nov. 16, Memorandum in opposition to defts' motion to stay district Court's Final Order, filed.

97 Dec. 13, Order that the Clerk is directed to file the attached packet of correspondence, etc. filed. EB. 12-13-76 entered and copies mailed.

98 Dec. 13, Correspondence, filed.

99 Dec. 14, Order that the time for transmission of the record to the USCA is extended by three days, etc., filed. EB 12-14-76 entered and copies mailed.

100 Dec. 14, Plff's notice of deposition of Frank S. Beal, filed.

101 Dec. 14, Plff's notice of deposition of Frank Beal, etc., filed.

102 Dec. 14, Intervenor-plff's supplemental brief in support of motion for reasonable counsel fees and affidavit in support, filed.

(2) COMPLAINT

[Filed January 19, 1973]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Class Action
Civil Action
Number 73-162

ELVIRA VECCHIONE, Philadelphia State Hospital at Byberry, Southampton Road & Roosevelt Blvd., Building #W-7, Philadelphia, Pennsylvania,

and

All other persons similarly situated,

Plaintiffs,

vs.

HELENE WOHLGEMUTH, Secretary Department of Public Welfare Commonwealth of Pennsylvania Health and Welfare Building Harrisburg, Pennsylvania,

FRANKLYN R. CLARKE, M.D., Superintendent Philadelphia State Hospital at Byberry, Southampton Road & Roosevelt Blvd., Philadelphia, Pennsylvania,

and

ELWOOD N. SHOEMAKER, Revenue Agent, Philadelphia State Hospital at Byberry, Southampton Road & Roosevelt Blvd., Philadelphia, Pennsylvania,

Defendants

I. PRELIMINARY STATEMENT

Petitioner, ELVIRA VECCHIONE,, who is *sui juris* and who is involuntarily committed to in-patient care in a Pennsylvania state hospital for the insane as a person in need of observation, care and treatment by reason of mental disability under §406 of the Pennsylvania Mental Health and Mental Retardation Act of 1966, 50 Purd. Stat. §4406, brings this action for Declaratory Judgment, Temporary Restraining Order, Preliminary and Permanent Injunction and damages, to enjoin defendants, all state officers performing state functions, from enforcing, operating under and executing §§424 and 501 of the aforesaid Mental Health Act, 50 Purd. Stat. §§4424 and 4501, statutes of statewide application. Petitioner assails these statutes insofar as they provide for summary self help seizure by defendants of any personal property in the possession of, and benefits payable to, petitioner and the subject class that she represents, at the time of their admission or commitment to state hospitals for the insane and thereafter, to be applied in whole or partial satisfaction of liability assessed by defendants extra judicially against them, as unconstitutional on their face and as applied, thus depriving petitioner and members of the class she represents of rights secured to them by the Fourteenth Amendment to the United States Constitution and 42 U.S.C. §1983.

II. JURISDICTION

1. Jurisdiction is conferred upon this Court by 28 U.S.C. §1343(3), (4) which provides for original jurisdiction of this Court in all suits to redress the deprivation under color of state law of any right, privilege or immunity secured by the Constitution of the United States. Jurisdic-

tion is also conferred upon this Court by 28 U.S.C. §1331: the matter in controversy exceeds in value, exclusive of interest and costs, ten thousand dollars ($10,000).

2. Plaintiffs' action for declaratory and injunctive relief is authorized by 28 U.S.C. §§2201, 2202 and Rule 57 of the Federal Rules of Civil Procedure, which relate to Declaratory Judgments, and by 42 U.S.C. §1983, which provides redress for the deprivation under color of state law of rights, privileges and immunities secured to all citizens and persons within the jurisdiction of the United States by the Constitution and laws of the United States.

III. THREE JUDGE COURT

3. This is a proper case for determination by a three-judge district court pursuant to 23 U.S.C. §§2281 and 2284 inasmuch as plaintiffs seek to enjoin defendants, state officers from enforcement, operation and execution of statutes (50 Purd. Stat. §§4424 and 4501) of statewide applicability on the ground that they are contrary to the Constitution of the United States on their face and as applied.

IV. PARTIES

4. Plaintiffs are:

a) ELVIRA VECCHIONE, a naturalized citizen of the United States, and resident of the County of Philadelphia, Commonwealth of Pennsylvania; and

b) All other persons similarly situated.

5. Defendants are:

a) HELENE WOHLGEMUTH, Secretary, Department of Public Welfare, Commonwealth of Pennsylvania, who is, in her representative capacity, charged with the executive functions of the Department of Public Welfare and under the Mental Health and Mental Retardation Act of 1966, 50 Purd. Stat. §§4401 *et seq.* with the administration of the Mental Health and Mental Retardation program in the Commonwealth, including but not limited to the operation and governance of Philadelphia State Hospital an Byberry (hereinafter referred to as "Byberry").

b) FRANKLYN R. CLARKE, M.D., Superintendent of Byberry, who is charged under the Mental Health and Mental Retardation Act of 1966, 50 Purd. Stat. §§4202 and 4203, and regulations of the Department of Public Welfare promulgated pursuant thereto, with the administration, direction, coordination and operation of Byberry and its programs, including but not limited to supervision of and operation of the office of the Revenue Agent at Byberry.

c) ELWOOD N. SHOEMAKER, Revenue Agent of Byberry, who is charged under the Mental Health and Mental Retardation Act of 1966, 50 Purd. Stat. §§4424 and 4501, with responsibility for the assessing of liability and the taking of any money or other personal property in the possession of any patient at Byberry, and the taking custody of any gifts, legacies, pensions, insurance payments, retirement benefits or payments to which any competent patient at Byberry, or any non-adjudged incompetent person with assets less than twenty-five hundred dollars ($2,500), and applying the aforesaid money, property and entitlements to these costs, without

prior adjudication of liability or attachment proceedings of any kind.

V. CLASS ACTION

6. The named plaintiff brings this action on her own behalf and, pursuant to Rule 28(a), (b)(2) of the Federal Rules of Civil Procedure, on behalf of the class of all persons who are *sui juris,* and all non-adjudged incompetent persons with assets less than twenty-five hundred dollars ($2,500), civilly admitted or committed to observation, care and treatment at any and all state facilities operating under authority of the Mental Health and Mental Retardation Act of 1966 (hereinafter "MH/MR Act") as aforesaid, who are subject under §§424 and 501 of the aforesaid Act to assessment of liability against themselves and to summary seizure of their personal property and entitlements without prior adjudication of personal or other liability or attachment proceedings of any kind.

7. The approximate size of this class is not known to plaintiff but, on information and belief, she alleges that the members of the class can readily be ascertained from information in the sole possession of the defendants and their agents.

8. The requirements of Rule 23 of the Federal Rules of Civil Procedure are met in that:

a) The class is so numerous that joinder of all members is impracticable;

b) There are questions of law and fact common to the members of the class, to wit: whether the challenged statutes violate the Equal Protection and Due Process Clauses of the Fourteenth Amendment

to the United States Constitution, and 42 U.S.C. §1983, on their face and as applied;

c) The claims of the representative party is typical of the claims of members of the class;

d) The representative party will fairly and adequately protect the interests of the class, in that she possesses counsel, Community Legal Services, Inc., which is expert in litigating cases of this type and which will prosecute the case with that vigor commensurate with its complexity and importance; and

e) Defendants have acted on grounds generally applicable to members of the class, thereby making appropriate final injunctive and declaratory relief for the class as a whole.

VI. APPLICABLE STATUTES AND REGULATIONS

9. Byberry is a state hospital for diagnosis, treatment, care and rehabilitation of mentally disabled persons operated under §§202 and 203 of the MH/MR Act, Spec. Sess. No. Oct. 20, P.L. 96 art. II; 50 Purd. Stat. §§4202 and 4203, by the State Department of Public Welfare, and funded, under §307(a)(1) of the MH/MR Act, 50 Purd. Stat. §4307(a)(1), by the Commonwealth of Pennsylvania.

10. Section 501 of the MH/MR Act, 50 P.S. §4501, provides that persons receiving diagnosis, treatment, care and rehabilitation at Byberry are responsible for all costs thereof.

11. Responsibility for assessing personal liability of each patient to defray some costs to the Commonwealth

of his care and maintenance at Byberry, are by force and operation of §501 of the MH/MR Act, *supra.* reposed in the Department of Public Welfare acting through its agent, defendant Shoemaker. Standards for assessment of liability used by the Revenue agent are set forth by the Department at DPW-MH/MR Manual §5200, Appendix II (attached hereto as Exhibit "A").

12. In addition to assessing and collecting personal liability of each patient, defendant Shoemaker is charged under the express terms of §424(1) of the MH/MR Act, 50 P.S. §4424(1), with the duty of taking custody of any or all money or personal property of, and any or all entitlements payable to, each patient who has not been determined by a court of appropriate jurisdiction to be an incompetent person, as that term is defined at §102(3) of the Pennsylvania Incompetents' Estates Act of 1955, February 28, P.L. 1154, art. I, 50 P.S. §3102(3), without prior adjudication by a court of any liability for care and maintenance of the patient and without attachment proceedings of any kind, and applying half thereof to maintain a five hundred dollar ($500) reserve fund for each patient, to be drawn upon by defendant Clarke from time to time to establish a petty cash fund for the patient's personal needs, and applying half thereof to pay the patient's costs arising under §601. Once a reserve fund of five hundred dollars ($500) is established for any patient, defendant Shoemaker applies all patient's property subsequently seized by him to pay the patient's assessed §501 costs.

13. In all cases that the patient's property and/or present entitlements exceeds twenty-five hundred dollars ($2,500), defendant Shoemaker is required by subpart

(4) of §424 to seek, through the State Department of Justice, appointment of a guardian of the estate of the patient pursuant to the aforementioned Incompetent's Estates Act of 1955.

14. If the patient is determined by an appropriate court to be an incompetent person, subpart (5) of §424 of the MH/MR Act requires defendant Shoemaker to turn over all funds seized by him to the incompetent's guardian along with a full and certified accounting.

15. If under this procedure, the patient is determined by an appropriate court to be *sui juris,* subpart (6) of §424 requires defendant Shoemaker to seize control of the property and manage it in the fashion set forth at allegation #12.

16. Under authority of §424, defendant Shoemaker, without the consent or authority of the patient, is authorized to make application to and is without prior hearing of any kind appointed representative payee for United States Social Security OASDI benefits payable to each eligible patient, under Social Security Administration procedures, despite the provisions of §207 of the Social Security Act, 42 U.S.C. §407, which expressly insulates OASDI benefits paid or payable to the patient, from execution, levy, attachment or other like legal process, and which would be a full and complete defense to the patient in an action by the Commonwealth arising under §501 against him, as to all OASDI monies paid or payable to him.

17. In all cases in which the Commonwealth fails to collect all assessed patient liability under the summary procedures established by §424 of the MH/MR Act, and elects to bring a lawsuit against the patient under §501, in addition to the exemption created by 42 U.S.C. §407

as aforesaid, the patient is entitled to raise the defenses arising under §504 of the MH/MR Act (1) that imposition of liability upon him would impose an undue hardship upon him, and or (2) that he is entitled to the reasonable value of unpaid work benefitting the Commonwealth in reduced costs of maintenance and operation of the facility to which he was admitted or committed, performed by him, by way of offset.

VII. FACTUAL ALLEGATIONS

18. Petitioner Elvira Vecchione is a resident of the Commonwealth of Pennsylvania, City and County of Philadelphia, and presently resides at Building W-7 at Byberry.

19. Petitioner is a naturalized citizen of the United States.

20. Petitioner was widowed on or about June, 1972, is seventy (70) years of age, and is entirley without means of support other than periodic Social Security OASDI benefits and her stock of personal property valued at no more than five hundred dollars ($500).

21. By Order of the Philadelphia Court of Common Pleas of October 28, 1971 (Hirsh, J), petitioner was adjudged a person in need of care, observation and treatment pursuant to §406 of the MH/MR Act, and civilly committed to Byberry, where she has remained from November 1, 1971 to the present time.

22. Throughout the period of her hospitalization, petitioner has been and remains *sui juris*.

23. On information and belief, petitioner alleges that she no longer requires hospitalization at Byberry, but requires care and assistance in the performance of her day-

to-day functions. Nevertheless, Byberry declines to discharge her because it is unable to find a bed for her in a licensed nursing home, intermediate care facility or other supervised living setting, which it deems appropriate for her aftercare.

24. On information and belief, petitioner alleges that her hospitalization and the costs thereof have been unduly prolonged and exaggerated not only by the failure of the Commonwealth to discharge her immediately upon her recovery, but by the failure of the Commonwealth throughout to provide her with minimally constitutionally required care and treatment.

25. At the time of her commitment to Byberry, petitioner's monthly Social Security OASDI benefits ceased without notice or explanation to petitioner of any kind, either from the Social Security Administration or from defendants.

26. At the time of her commitment, petitioner was advised that small sums of money in amounts considerably less than her Social Security income, would be given to her as authorized by her attending physician, for her to buy incidentals.

27. Until petitioner requested her counsel to investigate and report to her the reason that she no longer received her Social Security monthly benefits in January, 1973, she had no idea that on or about November, 1971, Byberry, by the predecessor in office to defendant Shoemaker, had applied for and received representative payee status for petitioner's Social Security entitlement, under Social Security Administration procedures, and had received all petitioner's Social Security OASDI payments, amounting to approximately one thousand four hundred dollars ($1,400), since then to the present time.

28. Petitioner, by her counsel, learned that of this amount, over the course of her hospitalization, five hundred dollars ($500) had been placed by defendant Shoemaker in petitioner's reserve fund; approximately two hundred dollars ($200) had been placed by defendant Clarke in petitioner's petty cash fund, and the remaining seven hundred dollars ($700) had been turned over to the Commonwealth in satisfaction of petitioner's assessed liability for the costs of her care and maintenance at Byberry.

29. Throughout the period that petitioner has resided at Byberry, she has been required to perform maintenance and housekeeping work from one to two hours per day, seven days per week, in and about the building in which she resides, to the benefit of, in behalf of and at the oral instances and requests of Byberry, its agents, employees and persons in active concert therewith, for which she received no compensation of any kind.

30. At no time during the period that petitioner has resided at Byberry has she been afforded an opportunity as formally or informally present.

a) Her offsetting claim for the reasonable value of work performed by her to the benefit of the Commonwealth without compensation of any kind, arising under §504 of the MH/MR Act;

b) Her defense, arising under §504 of the MH/MR Act, that the Secretary had made no determination that imposition of any liability upon her §501 would not impose undue hardship upon her;

c) Her defense that the value of her care and maintenance at Byberry was less than the amount assessed by defendants against her; and

d) Her defense, arising under 42 U.S.C. §407, that her Social Security benefits are not reachable by the Commonwealth under §424 or otherwise, in satisfaction of her assessed liability.

31. Petitioner is without adequate remedy at law as to seizure of her property by defendants inasmuch as

a) Under authority of §§424 and 501 of the MH/MR Act, and the procedures adopted by defendants in implementation thereof, petitioner has at no time received, nor will she receive, any prior notice or any prior opportunity whatsoever to challenge seizure of her property by defendants;

b) Under authority of §§424 and 501 as aforesaid, and under the procedures established by defendants, petitioner is wholly without recourse to restore her property to herself pending a final determination of liability; and

c) Under Pennsylvania law and defendant's procedures authorized by §§424 and 501 as aforesaid, defendants are not required to afford petitioner a subsequent opportunity for hearing, final determination of liability and restoration of her property. Under this procedure, the Commonwealth is not obligated to initiate court action or make an accounting of any kind to petitioner or to the court at any time.

32. Due to the loss to petitioner, under the Commonwealth's procedures, of past, present and future rights in her to control and manage her fiscal affairs; and due to the consequent actual and apparent risk attendant upon this involuntary imposition of a middleman in the form of a creditor of petitioner to receive and spend her money, of misappropriation thereof; and due to the loss of her of

interest that the bulk of her income might earn and might have earned, petitioner is irreparably damaged.

33. Because she is and, under authority of the MH/MR Act, will be, denied notice and hearing prior or immediately subsequent to appropriation by defendants of her property, petitioner, a person of advanced age and declining physical powers, is subject to the significant risk that she will in the foreseeable future lose defenses and offsetting claims by the death of her only witness; and is likewise subject to the risk that her defenses and offsetting claims may become time-barred, making appropriate the present action for declaratory and injunctive relief and damages.

34. Petitioner and members of the class that she represents have suffered and continue to suffer irreparable harm and injury by reason of defendants' enforcement of §§424 and 501 of the MH/MR Act in the fashion challenged herein, and have no adequate remedy at law.

VIII. FIRST CLAIM

For a first claim petitioner and all members of the class that she represents incorporate by reference paragraphs 1 through 34 above, and further allege:

35. Section 424 of the MH/MR Act provides that as to all persons who are *sui juris*, and all non-adjudged incompetent persons with assets less than twenty-five hundred dollars ($2,500) civilly admitted or committed to Byberry, defendant Shoemaker shall without application to any court seize any and all possessory property and entitlements payable to such persons, manage them and allocate fifty percent (50%) or more thereof to such persons' liabilities for care and maintenance as assessed by defendant Shoemaker under §501 of the MH/MR Act.

36. As to all persons who are adjudged incompetent and/or who have assets in excess of twenty-five hundred dollars ($2,500) at the time of their admission or commitment to Byberry, §424 of the MH/MR Act requires defendant Shoemaker to initiate proceedings for appointment of a guardian of the estate of such persons if none exists already; and to turn over all money or property of such persons seized by him to their guardians with a full and certified accounting. Thereafter, by force and operation of apposite Pennsylvania law, governing administration of incompetent's estates, payment of any monies to the Commonwealth in satisfaction of its §501 claims, out of the estates of incompetent persons, must be preceded by prior notice to all interested parties and prior judicial hearing and approval.

37. Section 424 of the MH/MR Act and apposite Pennsylvania law governing administration of incompetent's estates, accordingly creates two classes of civilly admitted or committed patients at Byberry for purposes of Due Process safeguards in assessing and collecting liability for care and maintenance arising under §501: one class composed of all competent patients, and all non-adjudged incompetent patients with present assets less than twenty-five hundred dollars ($2,500), who are denied any prior notice or hearing on the question of the correctness of the assessment and the availability of patient funds in satisfaction thereof; and another class composed of adjudged incompetent patients and non-adjudged incompetent patients with property and present entitlements in excess of twenty-five hundred dollars ($2,500), who are afforded both prior notice and hearing on the correctness of §501 assessments and the availability of patient funds in satisfaction thereof.

38. The only difference between these two classes of patients arises from the happenstance that, in addition to being insane, certain patients may also be incompetent and either have been so adjudged at the time of their admission or commitment to Byberry or have assets in excess of twenty-five hundred dollars ($2,500).

39. The classification created by this statute is arbitrary and without state justification and hence is invalid as contrary to the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

IX. SECOND CLAIM

For a second claim petitioner and all members of the class that she represents incorporate by reference paragraphs 1 through 34 above, and further allege:

40. Sections 424 and 501 of the MH/MR Act expressly and as applied by defendants provide that as to all persons who are *sui juris*, and all non-adjudged incompetent persons with assets less that twenty-five hundred dollars ($2,500), admitted or committed to Byberry, defendant Shoemaker shall, without notice and prior hearing of any kind, seize any and all property and entitlements payable to such persons, deprive them of control thereof and allocate fifty percent (50%) or more thereof to satisfy such persons' liabilities for care and maintenance at Byberry as assessed by defendant Shoemaker.

41. To the extent that these statutes fail to provide prior notice to persons subject thereto and prior opportunity for full and fair hearing on the extent of §501 liability, and availability of patient assets in satisfaction thereof, they are invalid as contrary to the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

X. PRAYER FOR RELIEF

WHEREFORE, petitioner, on her own behalf and on behalf of all others similarily situated, respectfully prays this Honorable Court:

1. To assume jurisdiction of this action and convene a three-judge District Court pursuant to 28 U.S.C. §§2281, and 2284 to determine this controversy.

2. To determine by order, pursuant to Rule 23(c)(1) of the Federal Rules of Civil Procedure, that this action be maintained as a class action.

3. To enter a declaratory judgment pursuant to 28 U.S.C. §§2201 and 2202 and Rule 57 of the Federal Rules of Civil Procedure, declarings that §§424 and 501 of the MH/MR Act, insofar as they authorize defendants' practice of seizing assets of all competent civilly admitted or committed patients and all non-adjudged incompetent civilly committed or admitted patients with assets less that twenty-five hundred dollars ($2,500), and managing such assets and allocating fifty percent (50%) or more thereof to pay patient liabilities as assessed by defendants, without prior notice and hearing of any kind, are unconstitutional on their face and as applied as repugnant to the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States.

4. To enter preliminary and permanent injunctions, pursuant to Rule 65 of the Federal Rules of Civil Procedure, enjoining defendants, their successors in office, and all persons in active concert and participation therewith from seizing, managing and allocating any and all assets paid or payable to petitioner and all members of the class that she represents as aforesaid, without prior notice and without affording them a prior opportunity for a judicial

determination of liability and availability of patient funds in satisfaction thereof.

5. To enter preliminary and permanent injunctions, pursuant to Rule 65 of the Federal Rules of Civil Procedure, enjoining defendants, their successors in office, agents, employees, and all persons in active concert and participation therewith, from failing to make an accounting to all subject patients, and from withholding all monies received by them in the past and that may be received by them hereafter, and reasonable interest thereon, under authority of the aforesaid unconstitutional statutes, from all subject patients.

6. Pursuant to Rule 54(d) of the Federal Rules of Civil Procedure, allow petitioner her costs herein, and grant petitioner and all other persons similarly situated such additional or alternative relief, including payment of monies wrongfully withheld and reasonable interest thereon, as this Court may deem just, proper and equitable; and

7. Retain jurisdiction over this matter.

Respectfully submitted,

(s) Joel Brewer
Joel Brewer
Douglas G. Dye
Jonathan M. Stein
Laurence M. Lavin
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313 South Juniper Street
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PE 5-6101

Dated: January 19, 1973

EXHIBIT "A"

COUNTY MENTAL HEALTH & MENTAL RETARDATION PROGRAM, SERVICE CONTENT OF THE PROGRAM

5200 Appendix II

DETERMINING COSTS OF SERVICE AND LIABILITY FOR COSTS OF SERVICE

1. DETERMINING COSTS OF SERVICES PROVIDED BY THE COUNTY PROGRAMS

1.1 *Services Operated Directly by the County or Provided by the County Through Contractual Arrangements*

1.11 *Determining Costs*

The costs of providing services are expected to vary with the nature of the services provided, the varying combinations of staff of Base Service Units and other facilities and agencies which tailor and adapt their programs to the needs of the population they are serving, as well as to various other factors. Facilities and agencies are encouraged to develop schedules of charges in terms of units of services that reflect as accurately as possible the actual cost of providing service and that will result in as simple schedules of charges as possible. Costs for client services shall not include costs for training, research, or other activities not essential to the provision of services to clients. Costs of services shall be determined either by the Admin-

istrator or the contracting facility (whichever is more appropriate) and shall be subject to State audit.

1.111 *Special Note on the Initial Contact*

One of the primary goals of a public mental health and mental retardation program is to provide easy access to treatment services and to encourage people to seek help. In addition, many people seeking such help will be found not to need mental health and mental retardation services, but services of other community agencies to which they can be referred. Therefore, there shall be no fee charged for the initial contact with any Base Service Unit nor shall any financial liability be incurred for the initial contact. The initial contact, broadly interpreted, refers to the contact necessary to determine whether or not the individual is in need of the diagnostic and treatment services of the Base Service Unit and the county program, and to arrange for such services.

1.2 *Services Purchased by the County on a Fee-For-Service Basis for individual Clients*

1.21 *Determining Fees to be Paid by the County on Behalf of Clients of the County Mental Health/Mental Retardation Program and Authorized on MH/MR 11 (Authorization for Service)*

1.211 If the service to be provided is covered by the Fee Schedule of this Appendix, the maximum fee to be paid will be that listed in this Schedule.

1.212 If the service to be provided is not covered by the above Fee Schedule, the fee to be paid shall be that established by the facility or agency furnishing the service,

provided that such charge reflects the usual costs of the facility or agency providing such services and does not exceed the prevailing charges for similar services.

(a) For Interim Care, the maximum fee for which the State will participate in payment shall not exceed the average per diem cost of care in the State School and Hospitals.

1.213 Under the Act all moneys due by reason of any liability imposed by this act upon any person for care and treatment for which the county makes an expenditure shall be collected by the county. Thus, where service has been provided for a client by a Base Service Unit, by a service funded under contract, or where the service has been purchased by the county for the client on a fee-for-service basis, the county shall collect the clients liability as determined by the Base Service Unit, for the costs of such services.

2. DETERMINING CHARGES TO CLIENTS

The maximum liability a client has for paying for the costs of services provided him shall be determined by following the procedure below in Section 3.

2.1 If client's maximum liability per month exceeds total costs of service provided during month client is charged full amount of costs.

2.2 If client's maximum liability is less than costs of providing services for that month, client shall be charged the amount of his maximum liability.

2.3 If there are extenuating circumstances warranting the modification or abatement of the above charges the procedure outlined in 5 shall be followed.

2.4 If the costs of services to the client are to be paid for by the Medical Assistance program, the charges to that program shall be the costs of services provided up to the maximum payable under the MA program (see Fee Schedule of this Appendix).

2.5 If the client's services are to be paid for in total or in part by other third party payments than Medical Assistance, the client remains liable for any costs in excess of such payments up to the amount of his maximum liability.

3. DETERMINING MAXIMUM LIABILITY

Following the initial determination of liability, there shall be at least an annual redetermination of liability of clients receiving continuous service.

The order of liability for costs of services shall be 1) the client, 2) the client's spouse, 3) the client's parents and children. (Legally Responsible Relatives are limited to the client's spouse, parents and children).

The extent of the client's and/or his legally responsible relative's maximum liability for the costs of services provided him over and above that paid for by third party payments and all other payments shall be determined as follows:

3.1 *Determine Monthly Adjusted Income*

This is income after all allowable deductions that can be used to meet the costs of services provided. Income from employment is income after deductions not available for purposes other than for which deducted, income from self-employment or business is net profit after deductions

for taxes and required deductions over which individual has no control.

If income fluctuates from month to month due to the nature of the occupation or other reasons, 1/12 of the previous 12 months income shall be used.

3.11 *Additional Allowable Deductions*

a. Deductions for dependents—$300 per month for the first dependent plus $60/month for each additional dependent. (e.g. family of four—$480). A dependent is anyone defined as such for federal income tax purposes.

b. Monthly equivalent of federal income tax payable above actual deductions (based on previous years experience; if deductions exceeded tax due, excess should be added to adjusted income).

c. If salaried, $35 per month for work expenses for each salaried income. Larger expenses due to unusual circumstances may be deducted if demonstrable.

d. Expenses for maintaining a dependent outside the home such as a student, a resident in an institution, or a separated or estranged dependent for whom one is providing support.

e. Expenses for medical care in excess of $8 per dependent per month, including costs of health insurance.

3.12 *Verification of Income*

Shall be on basis of any documentary evidence (pay stubs, employer statements, income tax statements, etc.) or by affidavit.

3.2 *Maximum Liability for Residential Service Under the County Program*

This service includes all services in which the client resides away from home except short-term inpatient care. The maximum liability per month for these services provided shall be the amount represented by the Adjusted Monthly Income divided by the number dependent on the income.

3.3 *Maximum Liability for Non-Residential Services (other than exempted services)*

3.31 First 3 months of service—one-half of the monthly adjusted income.

3.32 4th month thru 12th month—one-half of the monthly adjusted income divided by the number of dependents.

3.33 Service beyond 1 year—the liability determined in 3.32 shall be reduced 10% per year for each year in excess of one (i.e.—liability starting the 13th month shall be 90% of that of the 4th thru 12 month; starting the 25th month it shall be 60% of that of the 4th thru 12th month; etc.)

3.4 *Services Exempted from Liability*

No liability shall accrue for care in the following services:

3.41 *Day Care Services*

Such services are in lieu of services provided through the public educational system for which parents pay by way of taxes. To impose a liability for these services in addition to taxes paid would result in substantial hardship upon the legally responsible relatives.

3.42 *Sheltered Workshop Services*

The basic purpose for this program is to provide an opportunity for the mentally disabled to be engaged in a useful occupation within his limits and to enjoy a measure of feeling of independence and self-reliance. To hold relatives responsible for paying for such services is to negate these very feelings and be detrimental to the management of the client's disorder.

4. LIABILITY OF LEGALLY RESPONSIBLE RELATIVES

In the event that a client's liability is abated or modified by the Secretary pursuant to Section 504 of the Act, no liability shall accrue to such patient's legally responsible relatives by virtue of such abatement. When it becomes apparent that a contact with the legally responsible relatives would cause hardship on the patient by being detrimental to his treatment, such contact shall not be made.

5. ABATEMENT OR MODIFICATION OF LIABILITY

There may be circumstances warranting the modification or abatement of the above determined liability. The request for abatement or modification should insofar as possible be prepared by the client or his legally responsible relative. Staff of the Base Service Unit or County Administrator or other providers of service should provide all possible assistance in the preparation of these requests.

The requests should be prepared in duplicate and addressed to the Secretary of Public Welfare with a copy to the County Administrator. The request should contain:

a) Identifying data as to client—name, sex, age, address

b) Service to be provided and anticipated costs

c) Copy of information used to determine liability

d) Resources not listed in c that could possibly be used to meet costs of care including bank deposits, stocks, bonds, and other valuable assets including the value of more than one automobile. Do not include such items as household furniture and appliances, and resident real property (property in which the person lives). Also to be excluded are income producing non-resident real property if its value is reasonably related to the amount of income resulting or expected to result from ownership of such property, as well as any tools, equipment, or stock necessary to obtain income.

e) Circumstances warranting the requested abatement or modification such as unusual installment payment, payments on accumulated debts, unusal required rental or mortgage payments or other unusual expenses or extenuating circumstances tending to support the request for abatement or modification.

After review of the above information by the Secretary and the Attorney General, the Department sends a

notification of the decision to the client or his responsible relative. A copy is sent to the Administrator and two are forwarded to the provider of service who attaches a copy to the invoice.

5.1 *Appeal*

If the request of the client or his legally responsible relative is denied, they shall be advised by the Department that the decision may be appealed pursuant to Section 606 of the Act.

5.2 *Request for Abatement Initialed by the Court*

The county is responsible for collecting the liability resting upon the client and/or his legally responsible relatives for the costs of any services provided under the county program. In the event the county is unable to collect such costs because of refusal to pay, the unavailability of the client and/or his family, or similar circumstances, the county may request the Department to discharge the liability and to relieve them of this responsibility. Although, such requests must be for individual cases the requests may be grouped together as a periodic request for all cases to be considered for that period. All such requests must carry a statement as to what steps have been taken by the county to collect the amounts due and as to why it would be advisable for the Commonwealth to discharge such liability.

6. FEE SCHEDULE

The following schedule lists those fees especially applicable to the County Mental Health & Mental Retardation program and includes those abstracted from Supplemental

Supreme Court, U. S.
FILED
SEP 12 1977
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

October Term, 1977
No. 77-382

FRANK BEAL, SECRETARY, DEPARTMENT OF PUBLIC WELFARE, COMMONWEALTH OF PENNSYLVANIA, et al.,
Petitioners

v.

ELVIRA VECCHIONE, et al.

APPENDIX

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Deputy Attorney General
ALLEN C. WARSHAW
Deputy Attorney General
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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

1. DOCKET ENTRIES

VECCHIONE v. WOHLGEMUTH, et al.
CA-73-162

Date	Proceedings
1973	
1	Jan. 9, Plff's Motion for leave to proceed in forma pauperis, and Affidavit of Plff. in support thereof, filed.
(1)	Jan. 19, Order granting Plffs' Motion to proceed in Forma Pauperis, filed. EB 1/19/73 entered and copies mailed.
2	Jan. 19, Complaint, filed.
	Jan. 19, Summons exit.
3	Feb. 2, Summons returned, "on 1/24/73 served Dept. of Public Welfare", "on 1/23/73 served Philadelphia State Hospital at Byberry", filed.
4	Feb. 12, Deft's motion to dismiss Plff's complaint memorandum of law & affidavit of service, filed.
5	Feb. 20, Plff. motion for a temporary restraining order & notice thereof, filed.
6	Feb. 20, Plff. motion for a three judge court & notice thereof, filed.

7 Feb. 20, Plff. memorandum in support of plff motion for temporary restraining order, three judge court & for class action & exhibits, filed.

8 Feb. 20, Plff. motion for class action & notice thereof, filed.

9 Feb. 21, Supplemental memorandum in support of plff motion for temporary restraining order, three judge court, & for class action & in opposition to deft motion to dismiss, filed.

10 Feb. 26, Letter dtd. 2/22/73 to Judge Becker from Marx S. Leopold, Esq. Re: Withdrawal of any opposition to plff's Motion for Three-Judge Court, filed.

11 March 1, Order that Hon. Arlen M. Adams U. S. Circuit Judge & Hon. E. Mac Troutman are designated to sit with Hon. Edward Becker for determination of this case, filed. 3-1-73 entered & copies mailed.

12 March 2, Stipulation & Order that provisions of the stipulation are entered of record etc., Judges Adams & Troutman concur in this Order, filed. EB

13 July 30, Order that Hon. James Hunter, III is hereby appointed to replace Hon. Arlin M. Adams, filed. 7/31/73 Entered and copy mailed.

14 Aug. 6, Dfts' assent to motion of plff. for class action, filed.

15 Aug. 10, Order that counsel file with the Clerk of the Court copies of all pleadings & legal memoranda heretofore filed, and all subsequent pleadings for distribution to Hon. James Hunter, III and Hon. E. Mac Troutman, filed. EB 8/13/73 Entered and copies mailed.

16 Sept. 4, Stipulation and Order that stipulations of facts be entered of record as findings of the Court, filed. EB 9/5/73 Entered and copies mailed.

17 Sept. 14, Plff's motion for Summary Judgment upon stipulated facts & Statement of stipulated facts in support of plff's motion for Summary Judgment, filed.

18 Sept. 14, Brief in support of plff's motion for summary judgment upon stipulated facts, filed.

Oct. 4, Hearing on Motion to Dismiss by Dft and Motion for Summary Judgment by Plff. C.A

1974

19 May 10, Partial transcript of hearing of 10-4-73 re: defts' motion to dismiss and plffs' motion for summary judgment, filed.

20 July 11, Opinion and Order, Becker J., wherein it is ordered, adjudged and decreed that §424 of the Mental Health and Mental Retardation Act of 1966, 50 P.S. §4424 is Unconstitutional on its face and as applied in violation of the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the extent that it denies plff *et al* adequate notice/opportunity to be heard before taking control of these patients assets, etc.; defts are enjoined from applying said sections in the unconstitutional manner set forth above; that Commonwealth shall restore to plff money taken by Commonwealth when plff was hospitalized at the Phila. State Hospital at Bayberry, filed. 7-12-74 Entered & notice/copies mailed.

21 July 12, Order with Amendment to Opinion so that line 4, page 3 reads ". . . as to all persons who are

not adjudged incompetent, . . ." filed. 7-15-74 Entered & copies mailed.

1975

22 Feb. 7, Motion of Walter Burgess to intervene, notice, certificate of service and memorandum of law in support, filed.

23 Mar. 10, Plff's motion to hold deft in contempt of court, notice, certificate of service and memorandum of law in support, filed.

24 Mar. 11, Affidavits of Dallas Washington and Robert Sprout in support of Burgess' motion to intervene with certificate of service, filed.

25 Mar. 13, Plffs' amended motion for contempt of court and Order fixing 4/4/75 in Courtroom 14 at 10:00 A.M. for hearing re same, filed. 3/14/75 entered and copies mailed.

26 Mar. 25, Affidavit of Joseph Breslin in support of motion for intervention and certificate of service, filed.

27 Apr. 1, Plff's motion for preliminary injunction and affidavit in support, filed.

28 Apr. 2, Supplemental memorandum in support of motion of Burgess to intervene, filed. (certificate of service)

29 Apr. 4, Order that motion of plffs for comtempt is marked "withdrawn" and application of plff-intervenor Buress for preliminary injunction is marked "withdrawn", filed . 4/7/75 entered and copies mailed.

30 Apr. 4, Stipulation and order that the regulations attached shall be fully adopted by the deft Beal on behalf of DPW, etc., and granting Buress' motion to intervene etc., filed.

31 Apr. 22, Certification re compliance of Frank Beal with Court order of 4/4/75, filed.

32 June 5, Copies of collections from Guardian Accounts in State Hospitals, filed.

33 June 12, Appearance of Herbert Newberg as counsel for intervenor plff Buress, filed.

34 June 12, Motion of Buress to amend Paragraph r of order of 4/4/75 to include an allowance of counsel fees and costs from the fund created and certificate of service, filed.

35 Jun. 16, Plff/intervenor's (Buress) motion for contempt, further relief and leave for discovery and certificate of service, filed.

36 Jul. 10, Defts' petition for extension of time to comply with paragraph 4 of Court Order of 4/4/75, etc., filed.

37 Jul. 10, Defts' petition for clarification re full hearing on the merits of the issue, whether or not the funds distributed by Federal Agencies to DPW are within the ambit of the decision and orders of Court, etc., filed.

38 Jul. 11, Plffs' interrogatories to defts and Marx Leopold and certificate of service, filed.

39 Jul. 11, Plffs' notice of depositions of Frank Beal et al and certificate of service, filed.

40 Jul. 11, Plff Buress' motion for direct contempt and appointment of Master and response to defts' petitions for extension of time and clarification, and certificate of service, filed.

41 Aug. 1, Affidavit of Clifford McGill in support of plff's motion for direct contempt and appointment of master, filed.

42 Aug. 12, Intervenor-plff's brief in support of motion for reasonable counsel fee and certificate of service, filed.

43 Aug. 12, Affidavit of David Ferleger, Esq., filed.

44 Aug. 12, Affidavit of Jonathan M. Stein, Esq. relating to intervenor-plff's motion for counsel fees, filed.

Sept. 8, Settlement Conference, Becker, J.

45 Sept. 9, Report of pretrial conference, filed.

Nov. 13, Pretrial Conference, Becker, J.

46 Nov. 14, Report of pretrial conference, filed.

47 Dec. 22, Plff's motion for attorneys fees, notice and certification, filed.

48 Dec. 22, Plff's memorandum of law in support of motion, filed.

1976

49 Jan. 9, Defts' memorandum of law in opposition to plff's motion for attorneys' fees and certificate of service, filed.

50 Feb. 5, Plff-Intervenors motion for a class action & Memorandum of law in support thereof, filed.

51 Feb. 5, Motion of Charles Funk and Ruth Somogyi to intervene, memorandum in support thereof, filed.

52 Feb. 5, Motion of Plff-intervenor Ruth Somogyi and Charles Funk for contempt memorandum in support thereof, filed.

53 Feb. 6, Plff's motion for temporary restraining Order and preliminary injunction, certificate of service, filed.

54 Feb. 9, Plffs' memorandum on power of single judge to conduct contempt and other implementation proceedings and certificate of service, filed.

55 Feb. 10, Petition of Ruth Somogyi and Charles Funk for leave to proceed in forma pauperis with affidavits in support, filed.

56 Feb. 12, Defts' motion to vacate and/or modify consent decree, notice and memorandum of law in support thereof, filed.

57 Feb. 13, Plff's analysis of 12-12-75 pay back data and certificate of service, filed.

58 Feb. 13, Plff's supplemental memorandum of law, filed.

59 Feb. 13, Defts' memorandum of law, filed.

60 Feb. 13, Plffs' certificate of service on 2-6-76 of the Temporary Restraining Order, etc., filed.

61 Feb. 19, Memorandum of plffs and plff-intervenors on proposals by all parties for imterim order, with attached proposed orders, filed.

(51) Feb. 20, Order that motion for leave to intervene after hearing is Denied etc., filed. EB 2-23-76 entered and copies mailed.

62 Feb. 20, Request of Clifford McGill for the production of records and documents by the herein named defts, etc., and certificate of service, filed.

63 Mar. 3, Defts' objections to request of Clifford McGill for Production of Records and Documents, filed.

64 Mar. 9, Stipulation and Order that defts. shall give plff's counsel and the Court at least 24 hrs. advance notice prior to the transfer of or the drawing upon of any funds transferred from the general appropriation of the Dept. of Public Welfare which still remain in interest bearing Renenue Agent Guardian accounts, filed.

65 Mar. 29, Plff's memorandum in opposition to defts' motion to vacate and/or modify, filed.

66 Apr. 2, Plff's certificate of service re plff's memorandum in opposition defts' motion to vacate and/or modify, etc., filed.

67 Apr. 20, Reply memorandum of law in support of defts' motion to vacate and/or modify and certificate of service, filed.

68 Apr. 26, Plff's reply memorandum in opposition to defts' motion to vacate and or modify, filed.

69 May 26, Interim Order, etc., filed. EB 5-27-76 entered and copies mailed.

70 May 26, Second Interim Order, etc., filed. EB 5-27-76 entered and copies mailed.

71 Jun. 18, Plffs' motion for contempt and certificate of service, filed.

72 Jun. 23, Defts' response to motion for contempt, affidavit and certificate of service, filed.

73 Jun. 30, Defts' motion for extension of time in which to complete and report the results of sample, etc. notice thereof, filed.

74 Jul. 16, Stipulation and Order that the time in which a random sample of preliminary opinions shall be redone, and the time in which the resulting information shall be provided to plffs and the Court shall be extended to 8-2-76, etc., filed. EB

75 Jul. 16, Stipulation and Order that be agreeing on the procedures by which a random sample of preliminary opinions is to be redone pursuant to paragraph 15 of this Court's Second Intermin Order of May 26, 1976, no party has waived or in any way prejudiced his of her rights to challenge on any basis the results of the resulting random sample, etc., filed.

76 Sep. 20, Commonwealth defts' notice of deposition of Marx S. Leopold and certificate of service, filed.

77 Sep. 20, Commonwealth defts' notice of deposition of Cecil Maidman and certificate of service, filed.

78 Sep. 29, Deposition of Cecil Maidman, filed.

79 Sep. 29, Deposition of Donald D. Dougherty, filed.

80 Sep. 29, Deposition of Ellwood Shoemaker, filed.

81 Sep. 29, Deposition of Marx S. Leopold, Esq., filed.

82 Sep. 29, Deposition of Donald J. Murphy, filed.

83 Sep. 29, Deposition of John Greecher, filed.

84 Sep. 29, Deposition of Raymond Foote, filed.

85 Oct. 1, Three Judge Court Hearing—on 9-30-76—Motion to vacate or modify Consent Decree—CAV, filed. EB, JH MT

86 Oct. 1, Factual stipulations, filed.

87 Oct. 5, Deposition of Peter W. Brown, filed.

88 Oct. 8, Order that defts' motion to vacate and/or modify the Consent Decree is Denied, etc., filed. EB 10-12-76 entered and copies mailed.

89 Oct. 15, Transcript of testimony of 9-30-76, filed.

90 Oct. 19, Plff's Bill of Costs, notice thereof and certification of counsel, filed.

91 Nov. 4, Plffs' position with regard to matters at issue in defts' proposed stipulation regarding class members' funds and discharge to other facilities and certificate of service, filed.

92 Nov. 4, Stipulation and Order re" Disbursements, etc., filed.

93 Nov. 4, Deft's notice of appeal, filed.

94 Nov. 4, Copy of Clerk's Notice of Appeal to USCA, filed.

95 Nov. 10, Deft's motion for stay, memorandum of law in support and certificate of service, filed.

96 Nov. 16, Memorandum in opposition to defts' motion to stay district Court's Final Order, filed.

97 Dec. 13, Order that the Clerk is directed to file the attached packet of correspondence, etc. filed. EB. 12-13-76 entered and copies mailed.

98 Dec. 13, Correspondence, filed.

99 Dec. 14, Order that the time for transmission of the record to the USCA is extended by three days, etc., filed. EB 12-14-76 entered and copies mailed.

100 Dec. 14, Plff's notice of deposition of Frank S. Beal, filed.

101 Dec. 14, Plff's notice of deposition of Frank Beal, etc., filed.

102 Dec. 14, Intervenor-plff's supplemental brief in support of motion for reasonable counsel fees and affidavit in support, filed.

(2) COMPLAINT

[Filed January 19, 1973]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Class Action
Civil Action
Number 73-162

ELVIRA VECCHIONE, Philadelphia State Hospital at Byberry, Southampton Road & Roosevelt Blvd., Building #W-7, Philadelphia, Pennsylvania,

and

All other persons similarly situated,

Plaintiffs,

vs.

HELENE WOHLGEMUTH, Secretary Department of Public Welfare Commonwealth of Pennsylvania Health and Welfare Building Harrisburg, Pennsylvania,

FRANKLYN R. CLARKE, M.D., Superintendent Philadelphia State Hospital at Byberry, Southampton Road & Roosevelt Blvd., Philadelphia, Pennsylvania,

and

ELWOOD N. SHOEMAKER, Revenue Agent, Philadelphia State Hospital at Byberry, Southampton Road & Roosevelt Blvd., Philadelphia, Pennsylvania,

Defendants

I. PRELIMINARY STATEMENT

Petitioner, ELVIRA VECCHIONE,, who is *sui juris* and who is involuntarily committed to in-patient care in a Pennsylvania state hospital for the insane as a person in need of observation, care and treatment by reason of mental disability under §406 of the Pennsylvania Mental Health and Mental Retardation Act of 1966, 50 Purd. Stat. §4406, brings this action for Declaratory Judgment, Temporary Restraining Order, Preliminary and Permanent Injunction and damages, to enjoin defendants, all state officers performing state functions, from enforcing, operating under and executing §§424 and 501 of the aforesaid Mental Health Act, 50 Purd. Stat. §§4424 and 4501, statutes of statewide application. Petitioner assails these statutes insofar as they provide for summary self help seizure by defendants of any personal property in the possession of, and benefits payable to, petitioner and the subject class that she represents, at the time of their admission or commitment to state hospitals for the insane and thereafter, to be applied in whole or partial satisfaction of liability assessed by defendants extra judicially against them, as unconstitutional on their face and as applied, thus depriving petitioner and members of the class she represents of rights secured to them by the Fourteenth Amendment to the United States Constitution and 42 U.S.C. §1983.

II. JURISDICTION

1. Jurisdiction is conferred upon this Court by 28 U.S.C. §1343(3), (4) which provides for original jurisdiction of this Court in all suits to redress the deprivation under color of state law of any right, privilege or immunity secured by the Constitution of the United States. Jurisdic-

tion is also conferred upon this Court by 28 U.S.C. §1331: the matter in controversy exceeds in value, exclusive of interest and costs, ten thousand dollars ($10,000).

2. Plaintiffs' action for declaratory and injunctive relief is authorized by 28 U.S.C. §§2201, 2202 and Rule 57 of the Federal Rules of Civil Procedure, which relate to Declaratory Judgments, and by 42 U.S.C. §1983, which provides redress for the deprivation under color of state law of rights, privileges and immunities secured to all citizens and persons within the jurisdiction of the United States by the Constitution and laws of the United States.

III. THREE JUDGE COURT

3. This is a proper case for determination by a three-judge district court pursuant to 23 U.S.C. §§2281 and 2284 inasmuch as plaintiffs seek to enjoin defendants, state officers from enforcement, operation and execution of statutes (50 Purd. Stat. §§4424 and 4501) of statewide applicability on the ground that they are contrary to the Constitution of the United States on their face and as applied.

IV. PARTIES

4. Plaintiffs are:

a) ELVIRA VECCHIONE, a naturalized citizen of the United States, and resident of the County of Philadelphia, Commonwealth of Pennsylvania; and

b) All other persons similarly situated.

5. Defendants are:

a) HELENE WOHLGEMUTH, Secretary, Department of Public Welfare, Commonwealth of Pennsylvania, who is, in her representative capacity, charged with the executive functions of the Department of Public Welfare and under the Mental Health and Mental Retardation Act of 1966, 50 Purd. Stat. §§4401 *et seq.* with the administration of the Mental Health and Mental Retardation program in the Commonwealth, including but not limited to the operation and governance of Philadelphia State Hospital an Byberry (hereinafter referred to as "Byberry").

b) FRANKLYN R. CLARKE, M.D., Superintendent of Byberry, who is charged under the Mental Health and Mental Retardation Act of 1966, 50 Purd. Stat. §§4202 and 4203, and regulations of the Department of Public Welfare promulgated pursuant thereto, with the administration, direction, coordination and operation of Byberry and its programs, including but not limited to supervision of and operation of the office of the Revenue Agent at Byberry.

c) ELWOOD N. SHOEMAKER, Revenue Agent of Byberry, who is charged under the Mental Health and Mental Retardation Act of 1966, 50 Purd. Stat. §§4424 and 4501, with responsibility for the assessing of liability and the taking of any money or other personal property in the possession of any patient at Byberry, and the taking custody of any gifts, legacies, pensions, insurance payments, retirement benefits or payments to which any competent patient at Byberry, or any non-adjudged incompetent person with assets less than twenty-five hundred dollars ($2,500), and applying the aforesaid money, property and entitlements to these costs, without

prior adjudication of liability or attachment proceedings of any kind.

V. CLASS ACTION

6. The named plaintiff brings this action on her own behalf and, pursuant to Rule 28(a), (b) (2) of the Federal Rules of Civil Procedure, on behalf of the class of all persons who are *sui juris,* and all non-adjudged incompetent persons with assets less than twenty-five hundred dollars ($2,500), civilly admitted or committed to observation, care and treatment at any and all state facilities operating under authority of the Mental Health and Mental Retardation Act of 1966 (hereinafter "MH/MR Act") as aforesaid, who are subject under §§424 and 501 of the aforesaid Act to assessment of liability against themselves and to summary seizure of their personal property and entitlements without prior adjudication of personal or other liability or attachment proceedings of any kind.

7. The approximate size of this class is not known to plaintiff but, on information and belief, she alleges that the members of the class can readily be ascertained from information in the sole possession of the defendants and their agents.

8. The requirements of Rule 23 of the Federal Rules of Civil Procedure are met in that:

a) The class is so numerous that joinder of all members is impracticable;

b) There are questions of law and fact common to the members of the class, to wit: whether the challenged statutes violate the Equal Protection and Due Process Clauses of the Fourteenth Amendment

to the United States Constitution, and 42 U.S.C. §1983, on their face and as applied;

c) The claims of the representative party is typical of the claims of members of the class;

d) The representative party will fairly and adequately protect the interests of the class, in that she possesses counsel, Community Legal Services, Inc., which is expert in litigating cases of this type and which will prosecute the case with that vigor commensurate with its complexity and importance; and

e) Defendants have acted on grounds generally applicable to members of the class, thereby making appropriate final injunctive and declaratory relief for the class as a whole.

VI. APPLICABLE STATUTES AND REGULATIONS

9. Byberry is a state hospital for diagnosis, treatment, care and rehabilitation of mentally disabled persons operated under §§202 and 203 of the MH/MR Act, Spec. Sess. No. Oct. 20, P.L. 96 art. II; 50 Purd. Stat. §§4202 and 4203, by the State Department of Public Welfare, and funded, under §307(a) (1) of the MH/MR Act, 50 Purd. Stat. §4307(a) (1), by the Commonwealth of Pennsylvania.

10. Section 501 of the MH/MR Act, 50 P.S. §4501, provides that persons receiving diagnosis, treatment, care and rehabilitation at Byberry are responsible for all costs thereof.

11. Responsibility for assessing personal liability of each patient to defray some costs to the Commonwealth

of his care and maintenance at Byberry, are by force and operation of §501 of the MH/MR Act, *supra.* reposed in the Department of Public Welfare acting through its agent, defendant Shoemaker. Standards for assessment of liability used by the Revenue agent are set forth by the Department at DPW-MH/MR Manual §5200, Appendix II (attached hereto as Exhibit "A").

12. In addition to assessing and collecting personal liability of each patient, defendant Shoemaker is charged under the express terms of §424(1) of the MH/MR Act, 50 P.S. §4424(1), with the duty of taking custody of any or all money or personal property of, and any or all entitlements payable to, each patient who has not been determined by a court of appropriate jurisdiction to be an incompetent person, as that term is defined at §102(3) of the Pennsylvania Incompetents' Estates Act of 1955, February 28, P.L. 1154, art. I, 50 P.S. §3102(3), without prior adjudication by a court of any liability for care and maintenance of the patient and without attachment proceedings of any kind, and applying half thereof to maintain a five hundred dollar ($500) reserve fund for each patient, to be drawn upon by defendant Clarke from time to time to establish a petty cash fund for the patient's personal needs, and applying half thereof to pay the patient's costs arising under §601. Once a reserve fund of five hundred dollars ($500) is established for any patient, defendant Shoemaker applies all patient's property subsequently seized by him to pay the patient's assessed §501 costs.

13. In all cases that the patient's property and/or present entitlements exceeds twenty-five hundred dollars ($2,500), defendant Shoemaker is required by subpart

(4) of §424 to seek, through the State Department of Justice, appointment of a guardian of the estate of the patient pursuant to the aforementioned Incompetent's Estates Act of 1955.

14. If the patient is determined by an appropriate court to be an incompetent person, subpart (5) of §424 of the MH/MR Act requires defendant Shoemaker to turn over all funds seized by him to the incompetent's guardian along with a full and certified accounting.

15. If under this procedure, the patient is determined by an appropriate court to be *sui juris,* subpart (6) of §424 requires defendant Shoemaker to seize control of the property and manage it in the fashion set forth at allegation #12.

16. Under authority of §424, defendant Shoemaker, without the consent or authority of the patient, is authorized to make application to and is without prior hearing of any kind appointed representative payee for United States Social Security OASDI benefits payable to each eligible patient, under Social Security Administration procedures, despite the provisions of §207 of the Social Security Act, 42 U.S.C. §407, which expressly insulates OASDI benefits paid or payable to the patient, from execution, levy, attachment or other like legal process, and which would be a full and complete defense to the patient in an action by the Commonwealth arising under §501 against him, as to all OASDI monies paid or payable to him.

17. In all cases in which the Commonwealth fails to collect all assessed patient liability under the summary procedures established by §424 of the MH/MR Act, and elects to bring a lawsuit against the patient under §501, in addition to the exemption created by 42 U.S.C. §407

as aforesaid, the patient is entitled to raise the defenses arising under §504 of the MH/MR Act (1) that imposition of liability upon him would impose an undue hardship upon him, and or (2) that he is entitled to the reasonable value of unpaid work benefitting the Commonwealth in reduced costs of maintenance and operation of the facility to which he was admitted or committed, performed by him, by way of offset.

VII. FACTUAL ALLEGATIONS

18. Petitioner Elvira Vecchione is a resident of the Commonwealth of Pennsylvania, City and County of Philadelphia, and presently resides at Building W-7 at Byberry.

19. Petitioner is a naturalized citizen of the United States.

20. Petitioner was widowed on or about June, 1972, is seventy (70) years of age, and is entirley without means of support other than periodic Social Security OASDI benefits and her stock of personal property valued at no more than five hundred dollars ($500).

21. By Order of the Philadelphia Court of Common Pleas of October 28, 1971 (Hirsh, J), petitioner was adjudged a person in need of care, observation and treatment pursuant to §406 of the MH/MR Act, and civilly committed to Byberry, where she has remained from November 1, 1971 to the present time.

22. Throughout the period of her hospitalization, petitioner has been and remains *sui juris*.

23. On information and belief, petitioner alleges that she no longer requires hospitalization at Byberry, but requires care and assistance in the performance of her day-

to-day functions. Nevertheless, Byberry declines to discharge her because it is unable to find a bed for her in a licensed nursing home, intermediate care facility or other supervised living setting, which it deems appropriate for her aftercare.

24. On information and belief, petitioner alleges that her hospitalization and the costs thereof have been unduly prolonged and exaggerated not only by the failure of the Commonwealth to discharge her immediately upon her recovery, but by the failure of the Commonwealth throughout to provide her with minimally constitutionally required care and treatment.

25. At the time of her commitment to Byberry, petitioner's monthly Social Security OASDI benefits ceased without notice or explanation to petitioner of any kind, either from the Social Security Administration or from defendants.

26. At the time of her commitment, petitioner was advised that small sums of money in amounts considerably less than her Social Security income, would be given to her as authorized by her attending physician, for her to buy incidentals.

27. Until petitioner requested her counsel to investigate and report to her the reason that she no longer received her Social Security monthly benefits in January, 1973, she had no idea that on or about November, 1971, Byberry, by the predecessor in office to defendant Shoemaker, had applied for and received representative payee status for petitioner's Social Security entitlement, under Social Security Administration procedures, and had received all petitioner's Social Security OASDI payments, amounting to approximately one thousand four hundred dollars ($1,400), since then to the present time.

28. Petitioner, by her counsel, learned that of this amount, over the course of her hospitalization, five hundred dollars ($500) had been placed by defendant Shoemaker in petitioner's reserve fund; approximately two hundred dollars ($200) had been placed by defendant Clarke in petitioner's petty cash fund, and the remaining seven hundred dollars ($700) had been turned over to the Commonwealth in satisfaction of petitioner's assessed liability for the costs of her care and maintenance at Byberry.

29. Throughout the period that petitioner has resided at Byberry, she has been required to perform maintenance and housekeeping work from one to two hours per day, seven days per week, in and about the building in which she resides, to the benefit of, in behalf of and at the oral instances and requests of Byberry, its agents, employees and persons in active concert therewith, for which she received no compensation of any kind.

30. At no time during the period that petitioner has resided at Byberry has she been afforded an opportunity as formally or informally present.

a) Her offsetting claim for the reasonable value of work performed by her to the benefit of the Commonwealth without compensation of any kind, arising under §504 of the MH/MR Act;

b) Her defense, arising under §504 of the MH/MR Act, that the Secretary had made no determination that imposition of any liability upon her §501 would not impose undue hardship upon her;

c) Her defense that the value of her care and maintenance at Byberry was less than the amount assessed by defendants against her; and

d) Her defense, arising under 42 U.S.C. §407, that her Social Security benefits are not reachable by the Commonwealth under §424 or otherwise, in satisfaction of her assessed liability.

31. Petitioner is without adequate remedy at law as to seizure of her property by defendants inasmuch as

a) Under authority of §§424 and 501 of the MH/MR Act, and the procedures adopted by defendants in implementation thereof, petitioner has at no time received, nor will she receive, any prior notice or any prior opportunity whatsoever to challenge seizure of her property by defendants;

b) Under authority of §§424 and 501 as aforesaid, and under the procedures established by defendants, petitioner is wholly without recourse to restore her property to herself pending a final determination of liability; and

c) Under Pennsylvania law and defendant's procedures authorized by §§424 and 501 as aforesaid, defendants are not required to afford petitioner a subsequent opportunity for hearing, final determination of liability and restoration of her property. Under this procedure, the Commonwealth is not obligated to initiate court action or make an accounting of any kind to petitioner or to the court at any time.

32. Due to the loss to petitioner, under the Commonwealth's procedures, of past, present and future rights in her to control and manage her fiscal affairs; and due to the consequent actual and apparent risk attendant upon this involuntary imposition of a middleman in the form of a creditor of petitioner to receive and spend her money, of misappropriation thereof; and due to the loss of her of

interest that the bulk of her income might earn and might have earned, petitioner is irreparably damaged.

33. Because she is and, under authority of the MH/MR Act, will be, denied notice and hearing prior or immediately subsequent to appropriation by defendants of her property, petitioner, a person of advanced age and declining physical powers, is subject to the significant risk that she will in the foreseeable future lose defenses and offsetting claims by the death of her only witness; and is likewise subject to the risk that her defenses and offsetting claims may become time-barred, making appropriate the present action for declaratory and injunctive relief and damages.

34. Petitioner and members of the class that she represents have suffered and continue to suffer irreparable harm and injury by reason of defendants' enforcement of §§424 and 501 of the MH/MR Act in the fashion challenged herein, and have no adequate remedy at law.

VIII. FIRST CLAIM

For a first claim petitioner and all members of the class that she represents incorporate by reference paragraphs 1 through 34 above, and further allege:

35. Section 424 of the MH/MR Act provides that as to all persons who are *sui juris,* and all non-adjudged incompetent persons with assets less than twenty-five hundred dollars ($2,500) civilly admitted or committed to Byberry, defendant Shoemaker shall without application to any court seize any and all possessory property and entitlements payable to such persons, manage them and allocate fifty percent (50%) or more thereof to such persons' liabilities for care and maintenance as assessed by defendant Shoemaker under §501 of the MH/MR Act.

36. As to all persons who are adjudged incompetent and/or who have assets in excess of twenty-five hundred dollars ($2,500) at the time of their admission or commitment to Byberry, §424 of the MH/MR Act requires defendant Shoemaker to initiate proceedings for appointment of a guardian of the estate of such persons if none exists already; and to turn over all money or property of such persons seized by him to their guardians with a full and certified accounting. Thereafter, by force and operation of apposite Pennsylvania law, governing administration of incompetent's estates, payment of any monies to the Commonwealth in satisfaction of its §501 claims, out of the estates of incompetent persons, must be preceded by prior notice to all interested parties and prior judicial hearing and approval.

37. Section 424 of the MH/MR Act and apposite Pennsylvania law governing administration of incompetent's estates, accordingly creates two classes of civilly admitted or committed patients at Byberry for purposes of Due Process safeguards in assessing and collecting liability for care and maintenance arising under §501: one class composed of all competent patients, and all non-adjudged incompetent patients with present assets less than twenty-five hundred dollars ($2,500), who are denied any prior notice or hearing on the question of the correctness of the assessment and the availability of patient funds in satisfaction thereof; and another class composed of adjudged incompetent patients and non-adjudged incompetent patients with property and present entitlements in excess of twenty-five hundred dollars ($2,500), who are afforded both prior notice and hearing on the correctness of §501 assessments and the availability of patient funds in satisfaction thereof.

38. The only difference between these two classes of patients arises from the happenstance that, in addition to being insane, certain patients may also be incompetent and either have been so adjudged at the time of their admission or commitment to Byberry or have assets in excess of twenty-five hundred dollars ($2,500).

39. The classification created by this statute is arbitrary and without state justification and hence is invalid as contrary to the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

IX. SECOND CLAIM

For a second claim petitioner and all members of the class that she represents incorporate by reference paragraphs 1 through 34 above, and further allege:

40. Sections 424 and 501 of the MH/MR Act expressly and as applied by defendants provide that as to all persons who are *sui juris,* and all non-adjudged incompetent persons with assets less that twenty-five hundred dollars ($2,500), admitted or committed to Byberry, defendant Shoemaker shall, without notice and prior hearing of any kind, seize any and all property and entitlements payable to such persons, deprive them of control thereof and allocate fifty percent (50%) or more thereof to satisfy such persons' liabilities for care and maintenance at Byberry as assessed by defendant Shoemaker.

41. To the extent that these statutes fail to provide prior notice to persons subject thereto and prior opportunity for full and fair hearing on the extent of §501 liability, and availability of patient assets in satisfaction thereof, they are invalid as contrary to the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

X. PRAYER FOR RELIEF

WHEREFORE, petitioner, on her own behalf and on behalf of all others similarily situated, respectfully prays this Honorable Court:

1. To assume jurisdiction of this action and convene a three-judge District Court pursuant to 28 U.S.C. §§2281, and 2284 to determine this controversy.

2. To determine by order, pursuant to Rule 23(c)(1) of the Federal Rules of Civil Procedure, that this action be maintained as a class action.

3. To enter a declaratory judgment pursuant to 28 U.S.C. §§2201 and 2202 and Rule 57 of the Federal Rules of Civil Procedure, declarings that §§424 and 501 of the MH/MR Act, insofar as they authorize defendants' practice of seizing assets of all competent civilly admitted or committed patients and all non-adjudged incompetent civilly committed or admitted patients with assets less that twenty-five hundred dollars ($2,500), and managing such assets and allocating fifty percent (50%) or more thereof to pay patient liabilities as assessed by defendants, without prior notice and hearing of any kind, are unconstitutional on their face and as applied as repugnant to the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States.

4. To enter preliminary and permanent injunctions, pursuant to Rule 65 of the Federal Rules of Civil Procedure, enjoining defendants, their successors in office, and all persons in active concert and participation therewith from seizing, managing and allocating any and all assets paid or payable to petitioner and all members of the class that she represents as aforesaid, without prior notice and without affording them a prior opportunity for a judicial

determination of liability and availability of patient funds in satisfaction thereof.

5. To enter preliminary and permanent injunctions, pursuant to Rule 65 of the Federal Rules of Civil Procedure, enjoining defendants, their successors in office, agents, employees, and all persons in active concert and participation therewith, from failing to make an accounting to all subject patients, and from withholding all monies received by them in the past and that may be received by them hereafter, and reasonable interest thereon, under authority of the aforesaid unconstitutional statutes, from all subject patients.

6. Pursuant to Rule 54(d) of the Federal Rules of Civil Procedure, allow petitioner her costs herein, and grant petitioner and all other persons similarly situated such additional or alternative relief, including payment of monies wrongfully withheld and reasonable interest thereon, as this Court may deem just, proper and equitable; and

7. Retain jurisdiction over this matter.

Respectfully submitted,

(s) Joel Brewer
Joel Brewer
Douglas G. Dye
Jonathan M. Stein
Laurence M. Lavin
Attorneys for Plaintiffs
c/o Community Legal Services, Inc.
313 South Juniper Street
Philadelphia, Pennsylvania 19107
PE 5-6101

Dated: January 19, 1973

EXHIBIT "A"

COUNTY MENTAL HEALTH & MENTAL RETARDATION PROGRAM, SERVICE CONTENT OF THE PROGRAM

5200 Appendix II

DETERMINING COSTS OF SERVICE AND LIABILITY FOR COSTS OF SERVICE

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1. DETERMINING COSTS OF SERVICES PROVIDED BY THE COUNTY PROGRAMS

1.1 *Services Operated Directly by the County or Provided by the County Through Contractual Arrangements*

1.11 *Determining Costs*

The costs of providing services are expected to vary with the nature of the services provided, the varying combinations of staff of Base Service Units and other facilities and agencies which tailor and adapt their programs to the needs of the population they are serving, as well as to various other factors. Facilities and agencies are encouraged to develop schedules of charges in terms of units of services that reflect as accurately as possible the actual cost of providing service and that will result in as simple schedules of charges as possible. Costs for client services shall not include costs for training, research, or other activities not essential to the provision of services to clients. Costs of services shall be determined either by the Admin-

istrator or the contracting facility (whichever is more appropriate) and shall be subject to State audit.

1.111 *Special Note on the Initial Contact*

One of the primary goals of a public mental health and mental retardation program is to provide easy access to treatment services and to encourage people to seek help. In addition, many people seeking such help will be found not to need mental health and mental retardation services, but services of other community agencies to which they can be referred. Therefore, there shall be no fee charged for the initial contact with any Base Service Unit nor shall any financial liability be incurred for the initial contact. The initial contact, broadly interpreted, refers to the contact necessary to determine whether or not the individual is in need of the diagnostic and treatment services of the Base Service Unit and the county program, and to arrange for such services.

1.2 *Services Purchased by the County on a Fee-For-Service Basis for individual Clients*

1.21 *Determining Fees to be Paid by the County on Behalf of Clients of the County Mental Health/Mental Retardation Program and Authorized on MH/MR 11 (Authorization for Service)*

1.211 If the service to be provided is covered by the Fee Schedule of this Appendix, the maximum fee to be paid will be that listed in this Schedule.

1.212 If the service to be provided is not covered by the above Fee Schedule, the fee to be paid shall be that established by the facility or agency furnishing the service,

provided that such charge reflects the usual costs of the facility or agency providing such services and does not exceed the prevailing charges for similar services.

(a) For Interim Care, the maximum fee for which the State will participate in payment shall not exceed the average per diem cost of care in the State School and Hospitals.

1.213 Under the Act all moneys due by reason of any liability imposed by this act upon any person for care and treatment for which the county makes an expenditure shall be collected by the county. Thus, where service has been provided for a client by a Base Service Unit, by a service funded under contract, or where the service has been purchased by the county for the client on a fee-for-service basis, the county shall collect the clients liability as determined by the Base Service Unit, for the costs of such services.

2. DETERMINING CHARGES TO CLIENTS

The maximum liability a client has for paying for the costs of services provided him shall be determined by following the procedure below in Section 3.

2.1 If client's maximum liability per month exceeds total costs of service provided during month client is charged full amount of costs.

2.2 If client's maximum liability is less than costs of providing services for that month, client shall be charged the amount of his maximum liability.

2.3 If there are extenuating circumstances warranting the modification or abatement of the above charges the procedure outlined in 5 shall be followed.

2.4 If the costs of services to the client are to be paid for by the Medical Assistance program, the charges to that program shall be the costs of services provided up to the maximum payable under the MA program (see Fee Schedule of this Appendix).

2.5 If the client's services are to be paid for in total or in part by other third party payments than Medical Assistance, the client remains liable for any costs in excess of such payments up to the amount of his maximum liability.

3. DETERMINING MAXIMUM LIABILITY

Following the initial determination of liability, there shall be at least an annual redetermination of liability of clients receiving continuous service.

The order of liability for costs of services shall be 1) the client, 2) the client's spouse, 3) the client's parents and children. (Legally Responsible Relatives are limited to the client's spouse, parents and children).

The extent of the client's and/or his legally responsible relative's maximum liability for the costs of services provided him over and above that paid for by third party payments and all other payments shall be determined as follows:

3.1 *Determine Monthly Adjusted Income*

This is income after all allowable deductions that can be used to meet the costs of services provided. Income from employment is income after deductions not available for purposes other than for which deducted, income from self-employment or business is net profit after deductions

for taxes and required deductions over which individual has no control.

If income fluctuates from month to month due to the nature of the occupation or other reasons, 1/12 of the previous 12 months income shall be used.

3.11 *Additional Allowable Deductions*

a. Deductions for dependents—$300 per month for the first dependent plus $60/month for each additional dependent. (e.g. family of four—$480). A dependent is anyone defined as such for federal income tax purposes.

b. Monthly equivalent of federal income tax payable above actual deductions (based on previous years experience; if deductions exceeded tax due, excess should be added to adjusted income).

c. If salaried, $35 per month for work expenses for each salaried income. Larger expenses due to unusual circumstances may be deducted if demonstrable.

d. Expenses for maintaining a dependent outside the home such as a student, a resident in an institution, or a separated or estranged dependent for whom one is providing support.

e. Expenses for medical care in excess of $8 per dependent per month, including costs of health insurance.

3.12 *Verification of Income*

Shall be on basis of any documentary evidence (pay stubs, employer statements, income tax statements, etc.) or by affidavit.

3.2 *Maximum Liability for Residential Service Under the County Program*

This service includes all services in which the client resides away from home except short-term inpatient care. The maximum liability per month for these services provided shall be the amount represented by the Adjusted Monthly Income divided by the number dependent on the income.

3.3 *Maximum Liability for Non-Residential Services (other than exempted services)*

3.31 First 3 months of service—one-half of the monthly adjusted income.

3.32 4th month thru 12th month—one-half of the monthly adjusted income divided by the number of dependents.

3.33 Service beyond 1 year—the liability determined in 3.32 shall be reduced 10% per year for each year in excess of one (i.e.—liability starting the 13th month shall be 90% of that of the 4th thru 12 month; starting the 25th month it shall be 60% of that of the 4th thru 12th month; etc.)

3.4 *Services Exempted from Liability*

No liability shall accrue for care in the following services:

3.41 *Day Care Services*

Such services are in lieu of services provided through the public educational system for which parents pay by way of taxes. To impose a liability for these services in

addition to taxes paid would result in substantial hardship upon the legally responsible relatives.

3.42 *Sheltered Workshop Services*

The basic purpose for this program is to provide an opportunity for the mentally disabled to be engaged in a useful occupation within his limits and to enjoy a measure of feeling of independence and self-reliance. To hold relatives responsible for paying for such services is to negate these very feelings and be detrimental to the management of the client's disorder.

4. LIABILITY OF LEGALLY RESPONSIBLE RELATIVES

In the event that a client's liability is abated or modified by the Secretary pursuant to Section 504 of the Act, no liability shall accrue to such patient's legally responsible relatives by virtue of such abatement. When it becomes apparent that a contact with the legally responsible relatives would cause hardship on the patient by being detrimental to his treatment, such contact shall not be made.

5. ABATEMENT OR MODIFICATION OF LIABILITY

There may be circumstances warranting the modification or abatement of the above determined liability. The request for abatement or modification should insofar as possible be prepared by the client or his legally responsible relative. Staff of the Base Service Unit or County Administrator or other providers of service should provide all possible assistance in the preparation of these requests.

The requests should be prepared in duplicate and addressed to the Secretary of Public Welfare with a copy to the County Administrator. The request should contain:

a) Identifying data as to client—name, sex, age, address

b) Service to be provided and anticipated costs

c) Copy of information used to determine liability

d) Resources not listed in c that could possibly be used to meet costs of care including bank deposits, stocks, bonds, and other valuable assets including the value of more than one automobile. Do not include such items as household furniture and appliances, and resident real property (property in which the person lives). Also to be excluded are income producing non-resident real property if its value is reasonably related to the amount of income resulting or expected to result from ownership of such property, as well as any tools, equipment, or stock necessary to obtain income.

e) Circumstances warranting the requested abatement or modification such as unusual installment payment, payments on accumulated debts, unusal required rental or mortgage payments or other unusual expenses or extenuating circumstances tending to support the request for abatement or modification.

After review of the above information by the Secretary and the Attorney General, the Department sends a

notification of the decision to the client or his responsible relative. A copy is sent to the Administrator and two are forwarded to the provider of service who attaches a copy to the invoice.

5.1 *Appeal*

If the request of the client or his legally responsible relative is denied, they shall be advised by the Department that the decision may be appealed pursuant to Section 606 of the Act.

5.2 *Request for Abatement Initialed by the Court*

The county is responsible for collecting the liability resting upon the client and/or his legally responsible relatives for the costs of any services provided under the county program. In the event the county is unable to collect such costs because of refusal to pay, the unavailability of the client and/or his family, or similar circumstances, the county may request the Department to discharge the liability and to relieve them of this responsibility. Although, such requests must be for individual cases the requests may be grouped together as a periodic request for all cases to be considered for that period. All such requests must carry a statement as to what steps have been taken by the county to collect the amounts due and as to why it would be advisable for the Commonwealth to discharge such liability.

6. FEE SCHEDULE

The following schedule lists those fees especially applicable to the County Mental Health & Mental Retardation program and includes those abstracted from Supplemental

Medical Fee Schedule, DPW-PA Manual 6200, Appendix I and Medical Assistance (MA)-Physicians, Fee Schedule, DPW-PA Manual 9411 Appendix I, Services covered in these fee schedules may be purchased only when it is clear that the service is specifically for a mental disorder. All services purchased on a fee for service basis must have prior authorization of the Administrator.

A. PSYCHIATRIC SERVICES

1. Psychiatric-Individual

("Psychiatrist" is defined for purposes of this manual as a physician who by years of study, training and experience has achieved professional recognition and standing in the field of psychiatry. This determination shall be made by the Base Service Unit when service is purchased on a fee for service basis.)

a. Initial Examination and Evaluation by a Psychiatrist $25.00

(This shall include a complete examination consisting of a comprehensive history and evaluation of pertinent diagnostic information necessary to arrive at a diagnosis and treatment plan, recommendations for treatment and/or further diagnostic studies or consultation. The examination must be completed by a psychiatrist; it may include several interviews with other staff spread over a period of time until a treatment plan has been determined.)

b. Therapy Sessions (1 hour) 15.00

(These sessions must be under the direction of a psychiatrist.)

c. Therapy Sessions (½ hour) 7.50

(These sessions must be under the direction of a psychiatrist.)

d. Therapy Sessions (15 minutes)-Office, Mental Health and/or Mental Retardation Center, or Hospital Clinic primarily for drug regulation, brief checkups, etc. 4.00

2. Psychotherapy-Group Session

6 to 8 patients-per patient 4.00

(These sessions must be under the direction of a psychiatrist.)

3. Electro-Shock Therapy 15.00

Anesthesia for electro-shock therapy 5.00

B. NEUROLOGICAL SERVICES

1. Neurologic 25.00

Neurologic (follow-up) 15.00

2. Electroencephalogram 25.00

C. PSYCHOLOGICAL SERVICES

1. Psychological tests to include phychological evaluation including intelligence, aptitude, interest, achievement and personality inventory tests.

First test 10.00

Each additional test 5.00

Up to a maximum of 30.00

2. Projective Test Battery including all individual tests (below) and other tests not specified 40.00

3. Human Figure drawings 5.00

4. Rorschach 15.00

5. Sentence completion 5.00

6. Thematic Apperception Test 15.00

7. Bender Gestalt 5.00

D. PARA-MEDICAL

1. Speech Evaluation (full day) 10.00

2. Speech Evaluation (½ day) 5.00

3. Speech Therapy, Individual (1 hour) .. 5.00

4. Speech Therapy, Individual (½ hour) .. 3.00

5. Audiologist Training (1 hour) 5.00

6. Hearing Aid Evaluation (when performed by other than a physician) 15.00

7. Audiologic Evalution 15.00

8. Dactylogic Therapy (per hour) 5.00

E. SHORT TERM INPATIENT SERVICES

A facility will be paid the authorized Blue Cross rate for that facility. If there is no authorized Blue Cross rate for a facility, payment will be in accordance with a rate approved by the Department.

F. HOSPITAL VISITS BY A PSYCHIATRIST

When the rates in E above do not include services by a physician, the fee rates for hospital visits to a patient by a psychiatrist are:

First day patient in hospital, per day .. 10.00
Second day patient in hospital, per day . 5.00
Per day thereafter 3.00

G. PARTIAL HOSPITALIZATION SERVICES

The term partial hospitalization applies to a treatment session of not less than 3 hours. The fee rates are:

Three hour session 12.00

Each additional hour up to 6 ..... 4.00

Maximum in any 24 hour period 24.00

(The above fee rates include all services rendered to the patient in partial hospitalization.)

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Class Action
Civil Action
Number 73-162

ELVIRA VECCHIONE, Philadelphia State Hospital at Byberry, Southampton Road & Roosevelt Blvd., Building #W-7, Philadelphia, Pennsylvania,

and

All other persons similarly situated,

Plaintiffs,

vs.

HELENE WOHLGEMUTH, Secretary Department of Public Welfare Commonwealth of Pennsylvania Health and Welfare Building, Harrisburg, Pennsylvania,

FRANKLYN R. CLARKE, M.D., Superintendent Philadelphia State Hospital at Byberry, Southampton Road & Roosevelt Blvd., Philadelphia, Pennsylvania,

and

ELWOOD N. SHOEMAKER, Revenue Agent Philadelphia State Hospital at Byberry, Southampton Road & Roosevelt Blvd., Philadelphia, Pennsylvania,

Defendants.

(3) MOTION TO DISMISS PLAINTIFF'S COMPLAINT

[Filed February 12, 1973]

The defendants, by their attorney, Marx S. Leopold, Esquire, moves your Honorable Court to dismiss the plaintiff's Complaint in the within action for the following reasons:

1. There is no jurisdiction in your Honorable Court to try the within action.

2. The Complaint fails to state a claim upon which relief can be granted.

WHEREFORE, the defendants move your Honorable Court to dismiss the plaintiff's Complaint and enter judgment in favor of the said defendants.

(s) Marx S. Leopold
Marx S. Leopold
Assistant Attorney General

Dated: February 9, 1973

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 73-162

ELVIRA VECCHIONE

v.

HELENE WOHLGEMUTH, Secretary, Department of Public Welfare, Commonwealth of Pennsylvania

FRANKLYN R. CLARKE, M.D., Superintendent, Philadelphia State Hospital at Byberry

and

ELWOOD N. SHOEMAKER, Revenue Agent, Philadelphia State Hospital at Byberry

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(4) OPINION AND ORDER

[Filed June 11, 1974]

Before Hunter, Circuit Judge and Troutman and Becker, District Judges

Edward R. Becker, District Judge, July 11, 1974:

I. *Preliminary Statement*

This is a civil rights case, arising under 42 U.S.C. §1983. It deals with the right of patients confined in

state mental hospitals in Pennsylvania to control and manage their own property as against: (1) the right of the Commonwealth to summarily seize and control it for the duration of the hospitalization, without prior notice or hearing on the issue of the patient's competency to control that property; and (2) the right of the Commonwealth to appropriate part of the patient's property in satisfaction of the cost of care maintenance, without prior or subsequent hearing on the correctness of the Commonwealth's assessment.

The case arises within the framework of sections 424 and 501 of the Pennsylvania Mental Health and Mental Retardation Act of 1966 (Act), 50 P.S. §§4424 and 4501.[1] Section 501 provides that persons receiving diag-

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[1] The relevant portions of these provisions are quoted below.

§4424. Funds of persons admitted or *committed to State operated facilities*

Where no guardian has been appointed for a mentally disabled person admitted or committed to a State operated facility all money and other personal property of such person shall be handled in the following manner, unless the director determines that such person's recovery or well-being will be promoted by his own handling of such money or personal property:

(1) The authorized agent of the Department of Revenue shall, without application to any court, take custody of, receive and manage in accordance with this section any money or other personal property in such person's possession at the time he is admitted to a facility and any gifts, legacies, pensions, insurance payments, retirement benefits or payments, old age and survivors' insurance, or any other benefits or payments to which such person covered by the provisions of this act may be entitled.

(2) The revenue agent shall, upon the director's request, turn over to the director the sum of one hundred dollars ($100) to be used as such person's petty cash fund. Funds so held by the director shall be disbursed at his discretion to promote the welfare

nosis, treatment, care and rehabilitation at state mental hospitals are responsible for all costs thereof. Section 424

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of such person. The revenue agent shall, upon the director's request, restore the balance in each such person's petty cash fund to one hundred dollars ($100). For special purposes, the director may request funds for such person up to five hundred dollars ($500).

(3) Unless a guardian has been appointed and qualified, the revenue agent shall hold, apply and dispose of all funds in accordance with regulations promulgated by the department.

(4) Whenever the money and other personal property of such person exceeds two thousand five hundred dollars ($2,500) in value, the revenue agent shall request the Department of Justice to apply for the appointment of a guardian of such person's estate in accordance with the act of February 28, 1956 (P.L. 1154), known as the "Incompetents' Estates Act of 1955."

(5) When such guardian has been appointed and qualified pursuant to this section or in any other manner, he shall be entitled to receive from the revenue agent all money and other personal property in the custody of such revenue agent belonging to the person for whom he has been appointed guardian. All funds transmitted to the guardian shall be accompanied by a statement certified as true and correct and setting forth, in detail, a full accounting of such person's funds.

(6) Whenever such money and other personal property exceed two thousand five hundred dollars ($2,500) in value and the court rules that a guardianship is not appropriate, then such money and other personal property shall be handled in accordance with this section.

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§4501. *Liability of mentally disabled persons*

Whenever public funds are expended under any provision of this act on behalf of a mentally disabled person, the governmental body expending such funds may recover the same from such person subject to the regulations of the department and for this purpose liability is hereby imposed upon such person admitted, committed or otherwise receiving any service or benefit under this act

provides that, as to all persons who are not adjudged incompetent, civilly admitted or committed to a state mental hospital, the revenue agent at the hospital shall, without application to any court, seize any and all possessory property and present entitlements payable to such persons, manage them and appropriate from them for the cost of such person's care and maintenance as assessed by the revenue agent under §501 of the Act. On the other hand, as to all persons who are adjudged incompetent,[2] §424 requires the revenue agent to turn over all money or property of such persons to their guardians with a full and certified accounting. Payment of any monies to the Commonwealth in satisfaction of its §501 claims out of the estates of those adjudged incompetent persons must be preceded by prior notice and prior judicial hearing and approval, by virtue of the Incompetents' Estates Act of 1955, 50 P.S. §3101 et seq. In addition, §424 requires the Commonwealth to initiate proceedings under the Incompetents' Estates Act of 1955 for appointment of a guardian of the estate, if none exists already of any patient with assets in excess of $2,500 at the time of their admission to the mental institution. However, patients with $2,500 or less do not receive such an opportunity to have their assets

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for all costs, payments or expenditures with reference thereto, including but not being limited to the costs of admission or commitment, transportation, treatment, training, maintenance, complete care, partial care or aftercare and discharge.

Standards for assessment of liability used by the revenue agent are set forth by the Department of Public Welfare at DPW-MH/MR Manual §5200, Appendix II.

[2] A person may only be declared "incompetent" by a court of appropriate jurisdiction, as the term "incompetent" is defined in §102(3) of the Pennsylvania Incompetents' Estates Act of 1955, 50 P.S. §3102(3).

protected by a guardian or court under the Incompetents' Estates Act of 1955.

Plaintiff contends that §424 of the Act creates two classes of civilly admitted or committed patients for purposes of Due Process safeguards. One class, composed of all patients who have not been adjudged incompetent, is denied any prior notice or hearing before the Commonwealth takes control of those patients' assets and appropriates part of such assets to satisfy §501 claims. Another class, composed of adjudged incompetent patients, is afforded both prior notice and hearing before the Commonwealth can seize control of their funds and appropriate them to satisfy §501 assessments. Section 424 further separates these two classes by requiring the Commonwealth to seek, under the Incompetents' Estates Act of 1955, the appointment of a guardian for patients with assets in excess of $2,500, thereby augmenting the latter class. As to those patients with less than $2,500, however, the Commonwealth does not have to give them the benefit of notice or an opportunity for a hearing on whether they are incompetent, so these patients generally have no guardian or court to protect their assets, thus relegating them to the former, disadvantaged class.

Ironically, while these patients with more than $2,500 of assets receive prior notice and a hearing before being adjudged incompetent, if they are declared competent at such a hearing, the Commonwealth can then act under §424 to take control of and appropriate their funds without any further notice or hearing. Plaintiff submits that there is no legitimate state interest in differentiating between these two classes of patients and that the statutory classification offends the Equal Protection Clause of the Fourteenth Amendment. Plaintiff's second claim is that, to the extent that these statutes fail to provide prior notice and prior opportunity for full and fair hearing before taking control of and/or appropriating a mental patient's funds for payment of the Commonwealth's claims, they are invalid as contrary to the Due Process Clause of the Fourteenth Amendment.

Plaintiff Elvira Vecchione was, at the time that this action was brought, a patient at the Philadelphia State Hospital at Byberry (Byberry). She had not been declared incompetent and her assets were less than $2,500. Plaintiff sued in her own behalf and in behalf of all mental patients who are *sui juris* or are non-adjudged incompetent persons with assets less than $2,500 and who are civilly admitted or committed to Pennsylvania State hospitals for observation, diagnosis, care and treatment, and subject to §§424 and 501 of the Act.[3] In the prayer of her complaint, plaintiff sought declaratory and injunctive relief and also restitution of the sums withheld by the

[3] The Commonwealth did not object to plaintiff's motion for class action determination. However, during the hearing, counsel for plaintiff consented to withdraw the motion for class action since counsel for defendants agreed that the named plaintiff's case for injunction, declaratory judgment *and restitution would not be moot*, notwithstanding her discharge from Byberry. Even without this stipulation by defendants, the case would not be moot since plaintiff seeks restitution of funds still held by the Commonwealth, even after her discharge and up to the time of this opinion. While we do not need to rule on a class action motion in light of the withdrawal of this motion, we note that, since the Secretary of Welfare is a defendant, our resolution of the constitutional challenges raised by plaintiff has as far-reaching precedential effect as it would have had if the case were decided as a class action.

revenue agent.[4] Since the action sought to enjoin enforcement by a state officer of statutes of statewide application, a three-judge court was constituted.

On March 2, 1973, the District Court, sitting alone, and pursuant to a stipulation of the parties, ordered that temporary relief be afforded plaintiff until the case could be determined by the three-judge court.[5] Following a pretrial conference, the parties agreed that, with the exception of the testimony of two psychiatrists, the case could be determined on a stipulated record. A stipulation of facts was thereupon filed in which the defendants admitted the allegations contained in virtually all the paragraphs of plaintiff's complaint. For the hearing, plaintiff submitted an extensive brief upon the law. The Commonwealth submitted no brief, either before or after trial. For the reasons which follow, we agree with plaintiff's contentions that the provisions of §424 in question offend the Equal Protection Clause and that as to the disadvantaged class, §424 of the Act violates procedural Due Process guarantees of the Fourteenth Amendment. Accordingly, the permanent relief requested by plaintiff will be granted.[6]

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[4] Jurisdiction is conferred upon this Court by 28 U.S.C. §1343(3). Plaintiff's action for declaratory and injunctive relief is authorized by 28 U.S.C. §§2201, 2202, and F.R. Civ. P. 57.

[5] On March 2, 1973, the Court approved a stipulation for temporary relief, wherein: (1) defendants were to make a full accounting to plaintiff of all plaintiff's monies appropriated by defendants from November 1, 1971, to February 27, 1973; (2) defendants were to return to plaintiff all monies belonging to plaintiff or held in her behalf from February 27, 1973, until determination of the instant action.

[6] This opinion constitutes our findings of fact and conclusions of law under F.R. Civ. P. 52(a).

II. *Findings of Fact*

A. The Parties

Plaintiff, Elvira Vecchione, is a seventy year old widow who is entirely without means of support other than periodic Social Security OASDI benefits and her personal property valued at no more than $500.[7] On October 29, 1971, plaintiff was committed by Judge Ned L. Hirsh of the Court of Common Pleas of Philadelphia County to Byberry pursuant to §406 of the Act, 50 P.S. §4406, as a person in need of observation, care and treatment by reason of mental disability.[8]

Defendant Helene Wohlgemuth is Secretary of the Pennsylvania Department of Welfare, charged with the administration of the mental health and mental retardation program of Pennsylvania, including executive supervision of Byberry. Defendant Franklyn R. Clarke, M.D., is Superintendent of Byberry and is responsible under the Act for the immediate administration and operation of Byberry, including supervision of the office of Revenue Agent at that institution. Defendant Elwood N. Shoemaker is the Revenue Agent at Byberry and charged under §§424 and 501 of the Act with assessing liability for the costs of care and maintenance and taking custody of any money or other personal property in the possession

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[7] During her hospitalization at Byberry, plaintiff received $500 cash, representing her share of an estate that was settled. While still hospitalized, plaintiff placed this $500 in the highest interest bearing passbook savings account available at First Pennsylvania Banking & Trust Co.

[8] Byberry is a state hospital operated by the State Department of Public Welfare under §§202 and 203 of the Act, 50 P.S. §§4202 and 4203, and funded by the Commonwealth under 50 P.S. §4507(a)(1).

of any patient at Byberry, and of any gifts, legacies, pensions, insurance payments, retirement benefits or payments to which any competent patient at Byberry, or any non-adjudged incompetent patient with assets less than $2,500 may be entitled.

B. *The Statute as Applied to Plaintiff*

The plaintiff was confined at Byberry from October 29, 1971, to April 16, 1973. The Commonwealth concedes that she was at all times during her confinement competent to manage her financial affairs. Yet, by virtue of the statute, defendant Shoemaker is required to apply half of the plaintiff's money to maintain a petty cash reserve fund for each patient of up to $500, and uses the other half and any funds in excess of the $500 reserve to pay for the assessed costs, without prior adjudication of liability or attachment proceedings of any kind. In terms of the plaintiff's property, defendant Shoemaker, without notice and hearing or explanation, acting pursuant to §§424 and 501, summarily seized and appropriated $1,253.85 of her Social Security OASDI benefits to pay the alleged debt incurred by her for her care and treatment at Byberry. In the same manner, the Commonwealth seized control of an additional $1,356.63 of her Social Security OASDI benefits, and interest thereon, and deprived her of control thereof until her discharge. This $1,356.63 was turned over to plaintiff as follows: $332.39 was returned in cash at the time of discharge; $766.64 was spent by plaintiff from her petty cash fund as authorized by her attending physician over the course of her hospitalization, and, pursuant to this Court's Temporary Restraining Order, $257.60 was returned to plaintiff after she had established a permanent residence at 2024 Green Street, Philadelphia, Pa. in May 1973.

Under 50 P.S. §§4501 and 4424, the Commonwealth did not afford plaintiff the opportunity to challenge the validity and amount of the underlying indebtedness at any time prior or subsequent to appropriation of monies for alleged patient indebtedness for care. Under Pennsylvania law and defendants' procedures authorized by §§ 424 and 501 of the Act, defendants are not required to afford plaintiff a subsequent opportunity for hearing, final determination of liability and restoration of her property; in fact, the Commonwealth is not obligated to initiate court action or make an according of any kind to plaintiff or to the court at any time. On the other hand, adjudged incompetent patients and non-adjudged incompetent patients with property and present entitlements in excess of $2,500 were afforded both prior notice and hearing on the correctness of assessments for hospital care.

Plaintiff contends that she was deprived of procedural due process by the appropriation and application of her funds to the Commonwealth's claim without notice and hearing. Her claim is buttressed by her enumeration of the defenses which she would interpose to the Commonwealth's claim, but which she had no opportunity to assert because of the operation of the Act. While we do not need to reach a judgment on the merits of these defenses, we note that plaintiff has not received any hearing or opportunity to raise these contentions in a challenge to the Commonwealth's assessment against her for the cost of her hospitalization care and maintenance. These defenses include the following:

(a) Plaintiff alleges that imposition of any liability upon her would impose an undue financial and psychological hardship upon her, and accordingly would be ex-

cused, modified or abated under §504 of the Act,[9] and under *Commonwealth v. Heiser*, 95 Montg. Cy. L.R. 152 (Montg. C.P. 1972).

(b) Absent a knowing voluntary and intelligent assignment of Social Security OASDI benefits by the plaintiff, of which there was none, she alleges that such benefits are under the express terms of 42 U.S.C. §407 insulated from claims of creditors, including the state as provider of services. *See Philpott v. Essex County Welfare Board*, 409 U.S. 413 (1973). *Accord, In re Algier's Estate*, 43 D. & C. 2d 351 (Chester Cy. O.C. 1967).

(c) Plaintiff alleges that throughout her hospitalization Byberry afforded her less than constitutionally required treatment under *Wyatt v. Stickney*, 344 F. Supp. 387 (M.D. Ala. 1972), thereby prolonging her hospitalization and the costs therefor or warranting that she not have

[9] 50 P.S. §4504 provides in relevant part:

[T]he secretary . . . shall have the power . . . to abate, modify, compromise or discharge the [501] liability so imposed provided:

(1) He is satisfied that the imposition of such liability would: (i) result in the loss of financial payments or other benefits from any public or private source which a mentally disabled person would receive, would be eligible to receive or which would be expended on his behalf except for such liability, or (ii) result in a substantial hardship upon the mentally disabled person, a person owing a legal duty to support such person or the family of either, or (iii) result in a greater financial burden upon the people of the Commonwealth, or (iv) create such a financial burden upon such mentally disabled person as to nullify the results of care, treatment, service or other benefits afforded to such person under any provision of this act.

been committed at all.[10] Alternatively, plaintiff contends that the value of her care, on a *quantum meruit* basis or otherwise, was less than the value of her benefits appropriated by the Commonwealth. To support this contention, plaintiff notes that, until enjoined by Temporary Restraining Order dated March 2, 1973, the Commonwealth continued to appropriate at least 50% of plaintiff's Social Security OASDI benefits, despite the fact that from January 19, 1973, plaintiff no longer required hospitalization.

(d) Throughout the period that plaintiff resided at Byberry, in order to feel active and useful, she performed maintenance and housekeeping work consisting principally of making 16 beds per day and occasionally mopping floors for one to two hours per day, seven days per week, despite the efforts of defendants and their agents and employees to discourage plaintiff from performing any work because of her heart condition. Given a due process hearing, plaintiff would assert an offsetting claim for the value of this work performed by her which benefitted the Commonwealth, under §504 of the Act, as interpreted by *Estate of MacKnight*, 58 D. & C. 2d 794 (Phila. O.C. *en banc*, 1972) (Consent Decree). *See also Downs v. Dept. of Public Welfare*, Civil No. 73-1246 (E.D. Pa., filed May 7, 1974) (consent decree ordering Commonwealth as of Dec. 7, 1974, to pay patients for work which benefits mental institution).

[10] Plaintiff concedes that the duration of her hospitalization was prolonged in part by the unavailability of an aftercare placement facility deemed suitable for her by Byberry.

C. *The Competency of Plaintiff and Other Mental Patients To Handle Their Own Finances*

In addition to appropriating plaintiff's assets, the Commonwealth also took control of them under 50 P.S. §4424. This provision allows the Commonwealth to entirely divest plaintiff throughout her hospitalization of control of her own personal property and entitlements, except for small amounts which it granted or withheld at the discretion of the defendants herein and their officers and agents.

Throughout the period of her hospitalization, plaintiff was and she still remains *sui juris*. Defendants concede that plaintiff was and is competent to handle her own funds. At the hearing, two physchiatrists, with impressive qualifications in the field of treating mental patients, testified that mental patients like plaintiff, in general, are no less able to handle their own assets than the population at large. The psychiatrists acknowledged that for a brief period of a few days after patients are admitted to a mental institution, a large percentage of them may be in an acute or traumatic stage that would prevent them from handling their own funds during that brief period. This situation is analogous to the incapacity of a non-mental patient, such as an accident victim, who may not be able to manage his own funds for a period while his injury is acute. But the experts opined that such a brief incapacity should not be grounds for indefinitely denying such mental or non-mental patients control over their assets.

The psychiatrists also testified that depriving mental patients of any control and responsibility over their own funds would tend to prolong a person's stay in a

mental hospital, while giving them such control and responsibility is therapeutic. Plaintiff, in her brief, and these doctors referred to numerous studies to support these contentions. *See Hearings Before the Subcomm. On Constitutional Rights of the Sen. Comm. on the Judiciary,* 87th Cong. 1st Sess. 1961; Allen, Fenster and Weihoffer, *Mental Impairment and Legal Incompetency* (Prentice-Hall, 1968); *The Mentally Disabled and the Law,* Lindman (ed.) (Chicago, 1961); Greenblatt, York and Brown, *From Custodial to Therapeutic Patient Care in Mental Hospitals* (Russell Sage Foundation, 1955); Williams, "Money and the Therapeutic Process," 18 *Canada's Mental Health* 20 (1970); Cummings and Cummings, *Ego and Milieu* (Prentice-Hall, 1962). The medical judgment that mental patients are not prima facie incapable of handling their own financial affairs is apparently so well-established that on November 4, 1971, the Board of Directors of the National Association for Mental Health adopted a "Position Statement on Civil Rights of Mental Patients" which read at item 3:

> The fact that institutional care is required should not in and of itself create a status of incompetency either by operation of law or administrative practice. Admission to a service or treatment program should not give rise to a presumption of inability to manage one's affairs or exercise jural and civil rights.

At the hearing, the Court pressed the Commonwealth as to its position concerning the validity of these treatises and of the expert testimony elicited. Counsel for the Commonwealth responded that the Commonwealth accepted the view that "mental patients are, barring an adjudication of incompetency, capable of managing their

financial affairs." [Partial Transcript at 58.] In light of the impressive and uncontested evidence on this point and the Commonwealth's significant concession, we reject the existence of any *presumption* that mental patients, including plaintiff, are less capable of handling their assets than the public at large.

III. *Discussion*

A. *The Equal Protection Claim*

Under the rubric of the Equal Protection Clause, the Supreme Court has repeatedly held that statutory schemes may treat classes of citizens differently only if the statutory classifications are rationaly related to the purpose of the statute. *E.g., San Antonio Independent School District v. Rodriquez*, 93 S.Ct. 1278, 1300 (1973); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Reed v. Reed*, 404 U.S. 71 (1971); *Dandridge v. Williams*, 397 U.S. 471 (1970). As the Court explained in *Rinaldi v. Yeager*, 384 U.S. 305, 308-09 (1966):

> The Equal Protection Clause . . . imposes a requirement of some rationality in the nature of the class singled out . . . . [T]he Equal Protection Clause does require that, in defining a class subject to legislation, the distinctions that are drawn have "some relevance to the purpose for which the classification is made." (citations omitted.)

The Pennsylvania statute and collection practice challenged herein fails to meet this minimal rationality standard of equal protection. Section 424 establishes two classes of civilly admitted or committed mental patients. The first consists of all patients adjudged incompetent by a court of appropriate jurisdiction. The second class consists of all patients not adjudged incompetent. As noted,

since under §424(4), the Commonwealth must initiate proceedings under the Incompetents' Estates Act of 1955 to seek a guardian for all patients with assets in excess of $2,500, the first class is thus augmented, although if such patients are not adjudged incompetent, then they fall into the second, disadvantaged class, which also perforce includes those with assets less than $2,500. As to the first class, payment to the Commonwealth out of each incompetent's estate must, by force of Pennsylvania law governing administration of incompetents' estates, be preceded by notice to all interested parties and by judicial hearing and approval. As to the second class (in which plaintiff finds herself), §§424 and 501 expressly authorize defendants to summarily deprive this class of patients of custody and control of their property and apply it to pay hospital costs without prior or subsequent notice and hearing as to any patient indebtedness or the availability of patient property in satisfaction thereof.

The Commonwealth has pointed to no rational basis, not even revenue raising, for classifying mental patients in this manner for any purpose set forth in the Act. In fact, when viewed in light of §504(a) of the Act, which is calculated to alleviate the harsh economic and pyschological consequences to indigent mental patients of strict imposition of §501 costs, the practices authorized by §§424(1) and 501 appear counter-productive and internally inconsistent with the goals of the Act. More affluent incompetent mental patients would presumably be better able to afford the costs under §501 and would therefore be a great source of income. Maximizing the right of such persons to resist imposition of liability, while minimizing the rights of all others seems arbitrary and capricious.

Under the statutory scheme, the Commonwealth is able to summarily seize and appropriate assets of a patient not adjudged incompetent, while having to provide notice and opportunity for a hearing to a patient adjudged incompetent, but whose financial interests are protected by a guardian or a court under the Incompetents' Estates Act of 1955. Such a differentiation allows the Commonwealth to exercise stronger creditor's rights against competent patients than as against incompetent patients, without any regard to the liability or financial capability of these patients to meet their obligations. Furthermore, in view of our rejection of any presumption that mental patients are less capable of handling their assets than the public at large, it is arbitrary to treat those who are not adjudged incompetent as if they were not able to handle their own funds, and those who are adjudged incompetent as if they were, since the Commonwealth must then deal with a guardian or court under the Incompetents' Estates Act of 1955.

One possible argument for the Commonwealth might stem from §201 of the Incompetents' Estates Act of 1955, 50 P.S. §3201, which dispenses with the need for appointment of a guardian for incompetents with assets less than $2,500. However, that statute expressly and without exception requires prior judicial approval of the receipt and use of all or any part of an incompetent's assets. The $2,500 line in the Incompetents' Estates Act is drawn since it would be difficult to find guardians willing to serve for the nominal fees available from such small estates. But as a safeguard to preserve the property of incompetents with less than $2,500, the Incompetents' Estates Act still requires court authorization to dispose of such assets. Section 424 of the Act herein challenged

lacks both the rational basis and the safeguards in the Incompetents' Estate Act. It is not a rational basis for the Commonwealth to apply the $2,500 classification from one statute to another without any relation to the purposes of the Act in question.

In sum, we find that the classification of patients in state hospitals under §424 is irrational, arbitrary and so wholly unrelated to any purpose of the law in which the classification is made that it is impermissible on its face under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and 42 U.S.C. §1983.[11]

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[11] Since the Act under challenge does not meet the minimum rationality test of the Equal Protection Clause, *a fortiori* it will not satisfy a stricter scrutiny test requiring a compelling state interest when there are suspect classifications or fundamental interests involved. For cases finding fundamental rights, *see, e.g., Memorial Hospital v. Maricopa County*, 94 S.Ct. 1076 (1974) (right to travel); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (right to travel); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966) (right to vote). For cases dealing with suspect classifications, *see, e.g., Graham v. Richardson*, 403 U.S. 365 (1971) (nationality); *Korematsu v. United States*, 323 U.S. 214 (1944) (race). It is still unclear when wealth is considered a "suspect classification." *Compare Boddie v. Connecticut*, 401 U.S. 371 (1971) (state prohibited from barring access to divorce courts solely because of inability to pay court fees) (Douglas, J. concurring argues equal protection ground, while Harlan, J., writing for majority, based decision on due process rationale); *Harper v. Virginia Board of Education, supra* (wealth improper as criteria for voting right); and *Griffin v. Illinois*, 351 U.S. 12 (1956) (indigency not justifiable grounds for denying free trial transcript), *with San Antonio Independent School District v. Rodriguez*, 93 S.Ct. 1278, 1289 (1973) (and cases cited therein) (wealth discrimination in real estate taxes as basis for public school financing alone not basis for strict scrutiny). A recent

B. *The Procedural Due Process Claim*

Although we have addressed plaintiff's equal protection claim first, reflection reveals that her equal protection claim is essentially a claim for due process, since the invidious classification deprived plaintiff or any notice or opportunity for a hearing before or after the Commonwealth took control of and appropriated plaintiff's asssets. We find that, in addition to violating the Equal Protection Clause, provisions of section 424 of the Act are also unconstitutional because they fail to provide the procedural due process required by the Fourteenth Amendment. The Supreme Court has said that the Fourteenth Amendment sets forth the

> . . . root requirement that an individual be given an opportunity for a hearing before he is deprived of any significant property interest, except for extraordinary ~~si~~situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event.

Fuentes v. Shevin, 407 U.S. 67, 82 (1972). *See also Bell v. Burson,* 402 U.S. 535 (1971); *Goldberg v. Kelly,* 397 U.S. 254 (1970); *Sniadach v. Family Finance Corp.,* 395 U.S. 337 (1969).

In the instant case, property rights entitled to constitutional protection are at stake.[12] As in the case of the

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law review note argues that "mental illness" is a constitutionally suspect classification. Note, "Mental Illness: A Suspect Classification?," 83 *Yale L.J.* 1237 (1974). However, in light of our finding under the minimal rationality test for equal protection, we do not need to resolve whether fundamental rights and/or suspect classifications require a strict scrutiny test in this case.

[12] In addition to plaintiff's traditional property rights in her possessory assets and her statutory entitlements, such as her social

welfare benefits involved in *Goldberg v. Kelly,* 397 U.S. 254 (1970), and the driver's license involved in *Bell v. Burson,* 402 U.S. 535 (1971), the Social Security benefits or other income patients receive and which defendants have intercepted and appropriated under §§424 and 501 of the Act are a matter of statutory entitlement to plaintiff, and thus are property within the meaning of the Due Process Clause. *Goldberg v. Kelly, supra* at 262. Moreover, defendants' practice of taking custody and control of all monies in addition to the funds appropriated by the Commonwealth deprives plaintiff of her rights to use of her property. *Cf. Fuentes v. Shevin,* 407 U.S. 67 at 86 (1972). *See also Sniadach v. Family Finance Corp.,* 395 U.S. at 342 (Harlan, J. concurring).

In our view, the plaintiff's suit challenges a more objectionable practice than that struck down in *Fuentes.* Here, unlike *Fuentes,* the state interference with the plaintiff's right to use and control her property is in behalf of itself as creditor. *See In re Estate of Rabe,* 437 Pa. 72, 77-78 (1970). Here, unlike *Fuentes,* there is no provision for posting of a counter-bond by the plaintiff, or

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security benefits, plaintiff claims a constitutional right incident to the guarantee of liberty in the Due Process Clause to control her own property and "to receive such individual treatment as will give . . . [her] a realistic opportunity to be cured or to improve . . . her mental condition." *Wyatt v. Stickney,* 325 F. Supp. 781, 784 (M.D. Ala. 1971); *See also Rouse v. Cameron,* 373 F.2d 451 (D.C. Cir. 1966); *Nason v. Supt. of Bridgewater State Hospital,* 353 Mass. 604 at 614, 233 N.E. 2d 908 at 914 (1968). In light of our ruling above that the statute under challenge deprives plaintiff of her traditional property rights without due process, we need not reach the issue of whether they also deprive her of these alleged constitutional claims of "liberty" under the Due Process Clause of the Fourteenth Amendment.

any analogous procedure, by which the plaintiff can seek restoration of her property pending final determination of liability. Finally, the *Fuentes* court struck down the Florida replevin statute even though it included a full subsequent hearing. In the instant action there is no requirement that Pennsylvania ever afford plaintiff a subsequent hearing, nor any administrative procedure called to our attention for doing so.

While the recent Supreme Court decision in *Mitchell v. W. T. Grant Co.*, 42 U.S.L.W. 4671 (May 13, 1974), narrowed the scope of the *Fuentes* language, it did not discredit it for the purposes of the instant case. *Mitchell* held that a Louisiana sequestration procedure met due process requirements considering the respective interests of the buyer and seller and the fact that judicial control over the process minimized the risk of wrongfully giving the creditor interim possession. In the instant case, on the other hand, the respective interests of the parties to plaintiff's assets are significantly different, with the balancing clearly tipping in plaintiff's favor. And, unlike *Mitchell*, where a court must approve the ex parte sequestration order and provide notice and opportunity for a full subsequent hearing on the merits, here there is no judicial control or notice and hearing either before or even after the seizure and appropriation of plaintiff's property. Hence, we find the basic due process principles of *Fuentes* and its progeny, including *Mitchell*, still applicable to the case at bar.

Analogous to the instant case is *Dale v. Hahn*, 486 F.2d 76 (2d Cir. 1973), *aff'g* Unreported District Court Order, *on remand from* 440 F.2d 633 (2d Cir. 1971), wherein New York's failure to provide adequate notice

prior to the appointment of a committee to receive and disburse plaintiff's assets was challenged as violative of the Due Process Clause and of 42 U.S.C. §1983. The *Dale* court was faced with the circumstance that a patient was not adequately notified of the pendency of a judicial proceeding in which the state declared her incompetent and suspended her right to possession, use and control of her property. In the instant case, the state does not even provide a judicial hearing, let alone notice thereof. *A fortiori* the practice assailed herein must be set aside as violative of the Due Process Clause.[13]

At oral argument the Commonwealth attempted to justify its practice of taking custody of plaintiff's property before its right to appropriate the property can be judicially established, on the theory that there is an immediate threat of destruction, loss or mismanagement of the sought-after property by this type of plaintiff. The Commonwealth argument must fail for two reasons. The first problem with the Commonwealth's argument is that even if the Commonwealth's practice was generally justifiable under the facts, the statutes in question are not sufficiently narrowly drawn to track their alleged pur-

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[13] *See also McConaghley v. City of New York*, 304 N.Y. Supp. 2d 136 (N.Y. Civ. 1969). In *McConaghley*, the trial court set aside appropriation by the New York Department of Hospitals of $442 for alleged cost of care. This appropriation had been taken out of the $1450 found on the mentally disabled patient at the time of her commitment to Bellevue Hospital, under a Department of Welfare regulation providing for summary seizure of patient property to pay hospital costs. The court viewed this appropriation as prejudgment garnishment analogous to that struck down by the Supreme Court in *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969).

pose. A similar type of class presumption[14] was raised and rejected in *Fuentes v. Shevin, supra* with respect to the entire population of debtors there subject to prejudgment replevin. The statutes assailed herein, as in *Fuentes,* are not drawn to meet the "unusual condition" of an immediate risk of loss or destruction posed by certain individuals, but are aimed at an entire undifferentiated population. *See also Lebowitz v. Forbes Leasing & Finance Corp.,* 326 F. Supp. 1335, 1349 (E.D. Pa. 1971), *aff'd* 456 F.2d 979 (3d Cir.), *cert. denied,* 409 U.S. 843 (1972).

The second and even more fundamental problem with the Commonwealth's attempted justification of the statutes involved is that its factual underpinning, *i.e.,* that mental patients are presumptively incapable of handling their own funds, has been stripped by the Record in this case. If there were a necessary correlation between hos-

[14] The Commonwealth's presumption that all mental patients are incompetent to manage their own financial affairs becomes irrebuttable in some cases. If a mental patient has assets in excess of $2,500, the Revenue Agent, under §424(4) of the Act, 50 P.S. §4424(4), must request that the Department of Justice seek the appointment of a guardian for that patient, under the Incompetents' Estate Act of 1955. If, however, the court of appropriate jurisdiction declares such patient to be *sui juris* and refuses to appoint a guardian, the Revenue Agent may continue to summarily seize, control and appropriate such patient's assets under §424(6) of the Act, 50 P.S. §4424(6). We find that this type of irrebuttable presumption is not only factually unfounded, but also an unconstitutional deprivation of due process rights. *Cf. Bell v. Burson,* 402 U.S. 525 (1971) (presumption of fault for class of uninsured motorists); *Stanley v. Illinois,* 405 U.S. 645 (1972) (presumption that unmarried fathers are unfit parents); *Vlandis v. Kline,* 412 U.S. 441 (1973) (presumption of nonresidence of class of college students).

pitalization and incompetency, the statutes could perhaps be justified. However, in our findings of fact we have rejected the Commonwealth's hypothesis that mental patients may be presumed less competent to handle their own assets than the public at large. Hence there is no legitimate justification for the Commonwealth's interference with plaintiff's custody and control of her property without an adjudication that she was incompetent to manage it. Defendants concede, and we have found, that plaintiff was entirely competent to manage her affairs throughout her hospitalization and up to the present time. Moreover, the Commonwealth's own statutes reject the automatic correlation between hospitalization and incompetency. If the Commonwealth's hypothesis that all mental patients present an immediate risk of loss or destruction of property were in fact true, all mental patients could be adjudged legally incompetent. Pennsylvania's Incompetents' Estates Act of 1955, however, requires not just evidence of mental illness, but of three factors: (1) mismanagement, (2) mental illness, *and* (3) a causal nexus between the two.[15] *In re Streda's Estate,* 12 D. & C. 2d 523 (Del. Cy. O.C. 1957).

[15] Section 102(3) of the Incompetents' Estates Act, 50 P.S. §3102(3), defines an incompetent as ". . . a person who, because of mental infirmities of old age, mental illness, mental deficiency, drug addiction or inebriety, is unable to manage his property, or is liable to dissipate it or become the victim of designing persons."

One critic of the Pennsylvania-type incompetency statute suggests that the causal nexus between mismanagement and mental illness is ignored by the courts, thereby making mental patients who have mismanaged property in any particular circumstance especially vulnerable to indiscriminate adjudiciations of incompetence. Note, "The Disguised Oppression of Involuntary Guardianship: Have the Elderly Freedom to Spend?", 73 *Yale L. J.* 677 (1964).

In view of our conclusion that §424, read in conjunction with §501, of the Act offends the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution in the general context of this case, relief must be granted as requested by the plaintiff. In accordance with the foregoing opinion, we enter the following order.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action—No. 73-162

Elvira Vecchione

v.

Helene Wohlgemuth, Secretary Department of Public Welfare, Commonwealth of Pennsylvania

Franklyn R. Clarke, M.D., Superintendent, Philadelphia State Hospital at Byberry

and

Elwood N. Shoemaker, Revenue Agent, Philadelphia State Hospital at Byberry

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ORDER

AND NOW, this 11th day of June 1974, IT IS ORDERED ADJUDGED and DECREED that:

1. Section 424 of the Mental Health and Mental Retardation Act of 1966, 50 P.S. §4424, is unconstitutional on its face and as applied in violation of the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution to the extent that it denies: (a) plaintiff and other patients who are not adjudged incompetent adequate notice and opportunity to be heard before taking control of these patients' assets under 50 P.S. §4424 and/or appropriating such assets under 50 P.S. §4501; and (b) plaintiff and other patients with assets of $2,500 or less the protection of their assets that a guardian or a court would provide if they were adjudged incompetent under the Incompetents' Estates Act of 1955, 50 P.S. §3101 et seq.

2. The defendants are enjoined from applying 50 P.S. §§4424 and 4501 in the unconstitutional manner set forth above.

3. The Commonwealth shall restore to plaintiff all of plaintiff's monies held or taken by the Commonwealth or its agents from October 29, 1971, to April 6, 1973, when plaintiff was hospitalized at the Philadelphia State Hospital at Byberry.

(s) James Hunter, III
James Hunter, III,
Circuit Judge

(s) E. Mac Troutman
E. Mac Troutman,
District Judge

(s) Edward R. Becker
Edward R. Becker,
District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action—No. 73-162

Elvira Vecchione

v.

Helene Wohlgemuth, Secretary Department of Public Welfare, Commonwealth of Pennsylvania

Franklyn R. Clarke, M.D., Superintendent, Philadelphia State Hospital at Byberry

and

Elwood N. Shoemaker, Revenue Agent, Philadelphia State Hospital at Byberry

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AMENDMENT TO OPINION

On line four of page 3 of the Opinion, insert the word "not" before the word "adjudged" so that the phrase in line four reads: ". . . as to all persons who are not adjudged incompetent, ..."

For the Three-Judge Court:
(s) Edward R. Becker
Becker,
J.

Dated: July 12, 1974

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action—No. 73-162

Elvira Vecchione, et al.,
Plaintiffs

v.

Frank Beal, et al.,
Defendants

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(5) MOTION TO HOLD DEFENDANT IN CONTEMPT OF COURT

[Filed March 10, 1975]

Pursuant to Rule 70, Fed. R. Civ. Proc., plaintiff ELVIRA VECCHIONNE, by her counsel JONATHAN M. STEIN, Esq. and JOEL BREWER, Esq. respectively move this Honorable Court to adjudge defendants BEAL, CLARKE and SHOEMAKER in contempt of court, and aver in support thereof the following:

1. The above action challenging the unconstitutional taking and seizing of the monies and property of mental patients in hospitals pursuant to the Pa. Mental Health and Mental Retardation Act of 1966, 50 Purd. Stat. §§4424, 4501, was filed in 1973. Representations by defendants' counsel of the desire to enter into a con-

sent decree of unconstitutionality, which decree was never finalized, led to a belated hearing in the action in 1974.

2. This Court rendered its decision on July 11, 1974 since reported at 377 F. Supp. 1351. There was no appeal.

3. Notwithstanding the final judgment of this Court declaring the above statutes on their face and as applied as unconstitutional, enjoining their unconstitutional operation, and ordering the return of monies to the named plaintiff, defendants, including former Secretary of Public Welfare WOHLGEMUTH, and her successor in office, FRANK BEAL, have totally failed to comply with any aspect of the decision.

4. As a result, plaintiff VECCHIONNE'S harm and deprivation of property have not been remedied, and the property rights of other members of the class that brought the above action have similarly been prejudiced. See Motion To Intervene of WALTER BURESS, individually and on behalf of all others similarly situated.

5. Defendant state officials thus have refused to implement this Court's decision and continue to enforce across the Commonwealth the unconstitutional statutes.

6. The most expeditious means of implementing the Court's Order is for defendants to adopt immediately the drafted Consent Decree submitted to the Court and defendants prior to this Court's decision.

WHEREFORE, plaintiff respectfully requests this Honorable Court to adjudge defendants in contempt of court, to order immediate compliance with its July 11, 1974 Opinion and Order, to return property and monies unconstitutionally seized since July 11, 1974, and to fine

defendants for non-compliance of the Order requested herein if compliance is not shown after fifteen (15) days.

(s) Jonathan M. Stein
Jonathan M. Stein
Joel Brewer
Attorneys for Plaintiffs

Community Legal Services, Inc.
Sylvania House
Juniper & Locust Streets
Philadelphia, Penna. 19107

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action—No. 73-162

Elvira Vecchione, et al.,

Plaintiffs

v.

Frank Beal, et al.,

Defendants

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(6) AMENDED MOTION FOR CONTEMPT OF COURT

[Filed March 13, 1975]

Pursuant to Rules 65 and 70, Fed. R. Civ. Proc., plaintiff, by her counsel JONATHAN M. STEIN, Esq. and JOEL BREWER, Esq. respectfully amend their earlier Motion To Hold Defendants in Contempt of Court, to add MARX S. LEOPOLD, Esq. to its Motion set for hearing on April 4, 1975, by averring the following:

1. Mr. Leopold on July 11, 1975 and to the present has served as the Dept. of Public Welfare's General Counsel and knew of the full contents of this Court's July 11, 1975 Order at the time this Court rendered its decision.

2. Mr. Leopold was the chief person responsible for interpreting and implementing the Order.

3. No action has been taken by Mr. Leopold in complying with the Order in eight (8) months despite a draft of proposed regulations being prepared for him in August, 1974.

4. Mr. Leopold has continually ignored communications repeatedly made to him and his office to obtain implementation of the Order.

5. The proposed regulations finally given to plaintiff's counsel at a conference with Judge Becker on March 11, 1975 were not in conformity with that Order.

6. In addition, Mr. Leopold, through his delegate regional counsel, Mr. Cecil Maidman, Esq., has expressly refused to return monies and property to mental patients which were seized from them since July 11, 1974 pursuant to policies and statutes declared and enjoined as unconstitutional on July 11, 1974.

7. Attorneys and persons acting in concert or participation with defendants, such as Mr. Leopold, are expressly bound by injunctions per Rule 65(d).

8. The actions and inactions of Mr. Leopold with those of other named defendants have totally frustrated this Court's will to the detriment of thousands of mental patients whose rights to due process of law have been subverted.

WHEREFORE, plaintiff prays that Mr. Leopold be joined and ordered to appear at the April 4, 1975 hearing

to show cause why he should not be held in contempt of court.

(s) Jonathan M. Stein
Jonathan M. Stein
Joel Brewer
Attorneys for Plaintiffs

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IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action—No. 73-162

Elvira Vecchione,

Plaintiff

v.

Helene Wohlgemuth, et al.,

Defendants

* * * * * * * *

Walter Buress, individually and on behalf of all others similarly situated,

Plaintiff-Intervenor

v.

Frank Beal, et al.,

Defendants

---

(7) ORDER

[Filed April 4, 1975]

AND NOW, this 4th day of April, 1975, upon consideration of the agreement of the parties as to proper procedures and regulations for implementation of this Court's Opinion and Order of July 11, 1974, it is hereby ORDERED and DECREED:

1. The regulations attached hereto as Exhibit A shall be fully adopted by the Defendant Secretary of Public Welfare Frank Beal, on behalf of the Department of Public Welfare, and said regulations shall be published as immediately effective in the Pennsylvania Bulletin within fifteen (15) days. Within twenty (20) days, Defendant Beal, and his counsel, Marx Leopold, shall certify under oath to this Court that such adoption and publication has occured.

2. The Defendants Beal, Clarke and Shoemaker shall arrange for payment to the named Plaintiff, Elvira Vecchione, in full the sum of $1,253.85, representing the sum wrongfully withheld from her, within ten days. Within fifteen (15) days, said defendants and their counsel, Marx Leopold, shall certify to this Court under oath that such payment has taken place.

3. Defendant Frank Beal, Secretary of the Department of Public Welfare, shall order, within fifteen (15) days, the Directors and Revenue Agents of every state mental institution and facility to determine and report to Defendant Beal the names and addresses of all present and former patients whose funds and property were withheld under 50 P.S. §4424 or applied to their maintenance under 50 P.S. §4501 since July 11, 1974, and, in addition, the amounts withheld or applied to maintenance for each such patient or former patient. The Defendant Beal shall obtain and forward these reports to the Court and all plaintiffs' counsel within sixty (60) days of this Order.

4. Within ninety (90) days of this Order, Defendant Beal shall assure that all such amounts withheld under 50 P.S. §4424 shall be accounted for and that all such amounts applied to maintenance under 50 P.S. §4501 shall

be paid back to the patients or former patients, including interest earned. Such payment shall be accompanied by a full statement of account to all such patients and former patients. Within one hundred (100) days of this Order, Defendant Beal, and his counsel, Marx Leopold, shall file with this Court and all plaintiffs' counsel a statement certifying under oath the names, addresses, amounts withheld or applied to maintenance and amounts paid back to each former or present patient.

5. Plaintiff Walter Buress' uncontested motion to intervene is hereby granted and Defendant Beal shall arrange for payment to Walter Buress of the full sum wrongfully withheld from him since July 11, 1974, such payment to be made within ten (10) days. Within fifteen (15) days, Defendant Beal, and his counsel, Marx Leopold, shall certify to this Court under oath that such payment has taken place.

6. The failure to accomplish any of the above acts by the time specified, or the failure to file required certifications with the Court, shall be considered Contempt of this Court and will, after hearing, subject contemnors to fine or other appropriate sanction. The Court shall retain jurisdiction of this matter until the parties shall have fully complied with the terms of this Order.

(s) Edward R. Becker
Edward R. Becker,
J.

AGREED TO AND STIPULATED BY COUNSEL:

(s) Joel H. Brewer
Joel H. Brewer, Esq.
Jonathan M. Stein, Esq.
Community Legal Services, Inc.
Sylvania House
Juniper and Locust Streets
Philadelphia, Pa. 19107
Attorneys for Plaintiff

(s) David Ferleger
David Ferleger, Esq.
Mental Patient Civil Liberties Project
1427 Walnut Street
Philadelphia, Pa. 19102
Attorney for Intervenor-Plaintiff

(s) Marx Leopold
Marx Leopold, Esq.
Office of Legal Counsel
Department of Public Welfare
Harrisburg, Pa. 17120
Attorney for Defendants

(s) Cecil Maidman
Cecil Maidman, Esq.
206 State Office Building
Philadelphia, Pa. 19130
Attorney for Defendants

DEPARTMENT OF PUBLIC WEFARE REGULATIONS

Introduction

1. The regulations set forth below provide for the implementation of the Court's opinion and order in *Vecchione v. Wohlgemuth,* 377 F. Supp. 1361 (E.D. Pa. 1974), which declared Section 424 of the Mental Health and Mental Retardation Act of the Mental Health and Retardation Act of 1974, 50 P.S. §4424, unconstitutional on its face and Section 501 of that act, 50 P.S. §4501, unconstitutional as applied in conjunction with Section 424. The statutes were found to violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution.

Section 424 Not To Be Utilized

2. Section 424 of the Mental Health and Mental Retardation Act, 50 P.S. 4424, shall no longer be utilized or enforced in any manner whatsoever.

No Deprivation of Property Without Court Authorization

3. The Director, Revenue Agent and other officials and employees of each state mental hospital, state school and hospital or any annex of such facilities shall not deprive any patient/resident of custody of his or her personal property, or interfere with such custody, unless and until such person is determined to be incompetent under the Probates, Estates and Fiduciary Code of 1972 and those facilities or persons are so authorized by the appropriate court.

Non-Custodial Assistance With Property Management

4. The social services staff of each state mental hospital, state school and hospital or any annex of such facilities shall advise each patient/resident who has not

been declared incompetent by a court of appropriate jurisdiction, orally and in writing, upon admission and each month for the first three months thereafter that the said staff will be available to assist him or her to manage and safeguard his or her property. Each instance and manner of this advice shall be recorded in the patient/resident's medical chart. Such services and assistance shall include, but not be limited to, the following:

a. Providing access to, in person or by agent, and for transportation to and from, local banks and savings institutions of each resident's choice; banking by mail shall also be permitted and assisted;

b. Providing for secure interim safekeeping of patient/resident property if the patient/resident so desires.

Procedures for Determination of Competence

5. The Director of each state mental hospital, state school and hospital or any annex of such facilities shall formulate a preliminary opinion of each patient/resident's competence to manage his or her real and personal property not sooner than thirty days after such resident's admission or commitment. Provided however that such opinion of competence shall not be formulated when the patient/resident has a court-appointed guardian or is under eighteen years of age.

6. The preliminary opinion referred to in Paragraph 5 shall be formulated in the case of a mentally ill person by a psychiatrist and in the case of a mentally retarded person, by a psychologist or psychiatrist. Said opinion shall state in detail the medical and factual basis for the conclusions therein and shall, after approval by the Director, be promptly certified in writing to the Revenue Agent of the facility and a copy shall be given to the patient/resident.

7. If the Director's preliminary opinion is that the patient/resident is not competent to handle his or her real and personal property, or if he or she is under eighteen and has no parent, guardian or next friend, the Revenue Agent shall forthwith refer the matter to the Department of Justice which may institute proceedings under the Probate, Estate and Fiduciary Code of 1972 to have the patient/resident declared incompetent by a court of appropriate jurisdiction. In all cases, preference shall be given to recommending to the court appointment of a Bank or Trust Company willing to accept guardianship appointments.

8. In all cases where a court has appointed a guardian for a patient/resident or where the state institution, or an official or employee thereof, has obtained authorization by an appropriate court to receive, hold or dispose of such person's personal property by virtue of such person's incompetence, the following procedures shall be complied with:

a. The Director, or his or her delegate, shall thereafter review the patient/resident's symptoms, diagnosis, medical record and history every six months following the adjudication of incompetency to formulate an opinion as to whether the resident remains incompetent. This view shall be conducted in the manner of the evaluation described in Paragraph 6, above.

b. An opinion that the patient/resident remains incompetent must be documented in the pa-

tient/resident's records at each six month periodic review.

c. In the event that the Director's opinion is that the patient/resident is no longer incompetent, Director shall promptly institute action in the appropriate court to terminate the adjudication of incompetency.

d. In those cases where the state institution, or an official or employee thereof, has been appointed by a court to manage the person's estate, and the resident remains incompetent, but is ready for discharge as no longer seriously mentally disabled or is to be transferred to another institution, then the Director shall immediately institute an action in the appropriate court for appointment of a private guardian (preferably a Bank or Trust Company) or for another institution or official or employee thereof, to manage the person's estate, whichever is appropriate.

9. Any state institution, employee or official thereof, which has obtained authorization for an appropriate court to receive, hold or dispose of such person's personal property, by virtue of such person's incompetence as aforesaid, shall make no disbursements from the incompetent's estate for his or her care and maintenance in the institution without prior approval by the court following a full and fair hearing wherein the person is represented by a guardian ad litem. In no event shall the institution make disbursements from, or make claim to any portion of, the incompetent's estate for the period of six months from the adjudication of incompetence or last periodic review of said person's incompetence, whichever shall last occur.

Transition Provisions

10. Within three months from the effective date of these regulations, the Director of each facility shall cause a preliminary opinion to be formulated regarding the competence of each patient/resident to manage his or her real and personal property, when such patient/resident has been admitted or committed to the facility prior to the effective date of these regulations and remains in the facility. Opinions relating to such patient/residents shall be made and certified to in accordance with the provisions of these regulations and shall be processed in the same manner as applicable to patient/residents admitted or committed after the effective date of these regulations.

11. Patient/residents' accounts established by the Revenue Agent or Director of a facility pursuant to Section 424 (50 P.S. §4424) must be transferred either to such residents as they are determined to be competent under these regulations or, in cases where the court has appointed a guardian, to such guardian. Pending adjudication by the court of a resident's alleged incompetence, the Revenue Agent and Director of each facility shall remain responsible for previously established accounts under Section 424 provided that the petition for incompetence has been filed within 30 days after the preliminary opinion of incompetence. In the event the petition for incompetence is not filed within 30 days after the preliminary opinion, the account shall be transferred to the patient/resident. No new or additional accounts shall be established under the provisions of the aforesaid Section after the effective date of these regulations.

Billing Procedures

12. The Commonwealth agrees that residents who have not been declared incompetent by a court of appropriate jurisdiction receiving care and maintenance in state institutions shall be billed for the costs of such care and maintenance chargeable to them under Section 501 of the Mental Health and Mental Retardation Act of 1966, 50 P.S. §4501, as assessed by the Revenue Agent of each state institution, such billing to be in the same manner that any inpatient not suffering mental disability, in any public or private hospital, would be billed for the costs thereof, except:

a. The bill and all correspondence relating thereto must be accompanied by easily comprehensible notice, in English, and Spanish where appropriate, advising the patient of his or her right to seek counsel from an attorney or lay person of his or her choice, provided however that such counselor not also be an employee of the Commonwealth, and advising him or her of the right to the presence of counsel in any conferences with the Revenue Agent or any other Commonwealth employee with respect to settlement of the bill, and advising him or her of the right to confer with the Revenue Agent and to petition the Secretary under 50 P.S. §4504 and to obtain a hearing regarding abatement, modification or discharge of assessed liability on the basis that:

(i) Imposition of liability would result in loss of financial payments of benefits from any public or private source of which he or she might be entitled, 50 P.S. §4504 (a) (1) (i), or

(ii) Imposition of liability would result in a substantial financial hardship upon him, her or a person owing a legal duty of support to him or her, 50 P.S. §4504 (a) (1) (ii), or

(iii) Imposition of liability would result in greater financial burden upon the people of the Commonwealth, 50 P.S. §4504 (a) (1) (iii), or

(iv) Imposition of liability would result in a financial burden upon him or her that would nullify the results of care and treatment for mental disability, 50 P.S. §4505 (a) (1) (iv); or

(v) Social Security OASDI benefits are, and other federal or state benefits may be insulated from claims of the Commonwealth for care and maintenance by statute, 42 U.S.C. §407, or

(vi) The resident is entitled to the reasonable value of unpaid work benefitting the Commonwealth in reduced costs of maintenance and operation of the facility to which he or she was admitted or committed, performed by him or her, by way of offset, or

(vii) The care and maintenance is less than that assessed by the Commonwealth, or

(viii) Any other defenses or offsetting claims in law and equity.

Confidentiality and Proper Treatment

13. The office of the Revenue Agent shall conduct all financial dealings with the resident and/or his or her counsel as confidential, and shall not divulge the nature and contents of such dealings to any institutional officers, agents, or other persons charged with provision

of care and maintenance of such patient, without his or her consent or knowing, intelligent and voluntary waiver of his or her right to confidentiality, and in no event shall residents seeking modification, abatement or discharge of assessment of the Commonwealth, receive care, treatment and maintenance in any manner different from that received by other patients.

Failure To Pay

14. In the event that a resident fails to voluntarily pay his or her bill, whether following a conference with the Revenue Agent or otherwise, no state official or employee will in any way interfere with the residents possession, use, and control of his property except in execution of a judgment by a court of appropriate jurisdiction against him or her for the costs of care and maintenance, following full and fair hearing, wherein the patient is present by counsel or guardian *ad litem*. It is further agreed that the assessment of the Revenue Agent, following conference or otherwise, shall be the limit of the patient's liability for the period of care and maintenance for which judgment is sought.

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ORDER

AND NOW, this 4th day of April, 1975, after Hearing it is

ORDERED that: (1) The Motion of plaintiffs for contempt against defendants Clarke, and Shoemaker, and against Secretary of Welfare Frank Beal and against Marx S. Leopold, Esquire is marked "withdrawn"; and (2) The application of plaintiff-intervenor Walter Buress for a preliminary injunction is marked "withdrawn".

ATTEST:

By: _____
Deputy Clerk

OR

BY THE COURT;
Edward R. Becker
Judge

Filed
April 4, 1975
John J. Harding,
Clerk
By L M
Dep. Clerk

Civ 12-3/74

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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Walter Buress, individually and on behalf of all others similarly situated,

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v.

Frank Beal, et al.,

Defendants

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(8) MOTION TO VACATE AND/OR MODIFY CONSENT DECREE
[Filed February 12, 1976]

Defendants, by their counsel, hereby move this Court pursuant to F.R.C.P. 60(b) for an Order vacating and/or modifying the Consent Decree adopted and entered in this case on April 4, 1975. In support of this Motion, defendants make the following assertions:

1. This class action requesting restitution, declaratory and injunctive relief was commenced on January 19, 1973, and generally challenged the constitutionality of Sections 424 and 501 of the Mental Health and Retardation Act, (hereinafter the "Act"), 50 P.S. §§4424 and 4501. Specifically being challenged were the provisions of these sections allowing for summary seizure and control of property of mental patients and the application thereof in satisfaction of the costs of care and maintenance.

2. On July 11, 1974, after hearing, submission of an extensive brief by plaintiffs (which was not answered by the attorney for the defendants) and withdrawal of the original plaintiff's motion for a class action, a three-judge court concluded that Sections 424 read in conjunction with Section 501 of the Act offended the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution and accordingly granted the relief requested by plaintiff.

3. The Attorney for defendants, Marx S. Leopold, apparently took no action to communicate the basis, contents or import of the Opinion and Order of July 11, 1974, to the defendants and, as a result, defendants continued to apply Sections 424 and 501 of the Act, notwithstanding the Order of this Court declaring those sections to be unconstitutional and enjoining their application.

4. On February 7, 1975, Walter Buress, an inmate of a state mental hospital, filed a Motion To Intervene seeking damages, declaratory and injunctive relief for himself and his purported class.

5. On March 3, 1975, the original plaintiff filed a Motion for Contempt of Court based on defendants'

failure to comply with the Court's Order of July 11, 1974.

6. Hearing was set on plaintiff's Motion for Contempt and the Motion of Buress to intervene on April 4, 1975.

7. On April 4, 1975, a Consent Decree granting additional and Supplementary Relief intended to settle plaintiff's Motion for Contempt and plaintiff-intervenor's cause of action was submitted to and approved by this Court. It is that Consent Decree which is the subject of this Motion. (A copy of that Decree and its Exhibit "A" is attached hereto and made a part hereof as "Exhibit 1").

8. The aforesaid Consent Decree provides, *inter alia,* that Defendants shall pay back to all present and former patients, including plaintiff and plaintiff-intervenor, those funds and/or property withheld under Section 424 of the Act or applied to their maintenance under Section 501 of the Act since July 11, 1974.

9. The aforesaid Consent Decree also requires defendant Secretary of Public Welfare Frank Beal to fully adopt and publish regulations which provide, *inter alia,* that:

(a) Officials of state mental facilities are precluded from depriving residents of such facilities of their personal property unless and until such person is determined to be incompetent under the Probates, Estates and Fiduciary Code of 1972 and these facilities or persons are so authorized by the appropriate court. (Ex. 1, para. 3 of Ex. "A").

(b) Officials of state mental institutions, after obtaining the requisite determination and authorization, are still precluded from making disbursements from the incompetent's estate without a full hearing and judicial approval based thereon. (Ex. 1, para. 9 of Ex. "A").

(c) Officials of mental health facilities apparently may never make disbursements for incompetent's estate under a fair reading of the Order in this case in that no disbursement is permitted within six months of the date of the finding of incompetency or the last review of incompetency which review is required every six months. (Ex. 1, paras. 8 and 9 of Ex. "A").

(d) Initially, the director of each mental health facility is required to preliminarily determine which residents are competent and which are not according to procedures set forth in the court adopted regulations. (Ex. 1, para. 10 of Ex. "A").

(e) Within thirty days of the preliminary opinions the director and/or revenue agent shall cause to be filed a petition for incompetency for those preliminarily determined to be incompetent or the estate must be turned over to the resident. (Ex. 1, para. 11 of Ex. "A").

10. Marx Leopold was, in the period including April of 1974, to September of 1975, General Counsel to the Department of Public Welfare and was not a Deputy Attorney General.

11. Cecil Maidman was not, in the period including April of 1975, a Deputy Attorney General.

12. Marx Leopold and Cecil Maidman are not now, nor have they ever been, expressly or impliedly by statute

or otherwise, authorized to settle this case on behalf of the Commonwealth or Commonwealth officials. Such power is reserved by statute, regulation and policy to the Attorney General, and, with his approval, his Deputies.

13. The regulations of the Department of Justice, specifically 37 Pa. Code §§141.51-52 are applicable to the present case in that this settlement concedes the unconstitutionality of a state statute, will result in commonwealth expenditure of in excess of $1,000,000 and is unusual or unique (See memo p. 6 infra).

14. Marx Leopold and Cecil Maidman entered into this Consent Agreement in this case without knowledge or approval of either the Attorney General, the First Deputy Attorney General, or the Solicitor General.

15. The Consent Decree in this case violates the Eleventh Amendment to the Constitution of the United States.

16. Because no executive officer or employe is empowered to waive the Commonwealth's immunity under the Eleventh Amendment, the Consent Decree adopted and entered by this Court on April 4, 1975, is in violation of that Amendment.

17. The Consent Decree and the litigation related thereto was predicated upon a misconception, as all counsel and the court itself were unaware of the fact that the monies sought to be effected by the consent decree were *not* being handled under the provisions of Section 424 of the Mental Health/Mental Retardation Act or Section 501 of the Mental Health/Mental Retardation Act.

18. In point of fact, the monies in question were being awarded to the revenue agent not as "statutory

guardian" under Section 424 of the Act, but as "representative payee" under the provisions of the Federal Social Security Act.

19. Because of the above mutual mistakes of fact, while the original Vecchione decision is correct in that Section 424 and Section 501 of the Mental Health/Mental Retardation Act taken together are unconstitutional, the *consent decree* being based upon a mutual mistake of fact must be modified and/or vacated.

20. Despite the above enumerated difficulties with the Consent Decree, the defendants, in deference to this Court, have in good faith, attempted to comply with its terms; however, compliance with the Decree is impossible for a variety of reasons:

(a) No appropriations exist to pay filing fees in the court proceedings called for by the consent decree.

(b) Defendants have been unable to utilize the patient's own funds for the payment of the filing fees and court costs.

(c) The widespread reluctance of banks to act as guardians and the futility in point of fact of appointing banks if they did consent.

(d) The lack of any suitable individuals to suggest to the court as guardians in any proceedings under the Probates and Estates Act.

(e) The inability and unwillingness of the Pennsylvania court system to entertain the judicial proceedings required by the Consent Decree. (See the letter of the Honorable Alexander F. Barbieri, Court Administrator of Pennsylvania, to the Attor-

ney General, dated December 30, 1975, a true and correct copy of which is attached hereto and made a part hereof as Exhibit 2).

WHEREFORE, Defendants respectfully request this Court to vacate and/or modify the Consent Decree in this matter so as to eliminate those portions of the Consent Decree which violate the Eleventh Amendment and so as to provide due process protections for plaintiffs which are not impossible for defendants and the courts of Pennsylvania to provide.

(s) Allen C. Warshaw
Allen C. Warshaw
Deputy Attorney General
Norman J. Watkins
Deputy Attorney General
Lawrence Silver
Deputy Attorney General
Chief, Civil Litigation
Robert P. Kane
Attorney General

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Before Hunter, Circuit Judge, and Troutman and Becker, District Judges

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(9) OPINION AND ORDER
[Filed January 13, 1977]

Edward R. Becker, District Judge, January 13, 1977:

I. Preliminary Statement

On July 11, 1974, we filed a three-judge court opinion in this 42 U.S.C. §1983 case which deals with the

> right of patients confined in state mental hospitals to control and manage their own property as against (1) the right of the Commonwealth to summarily seize and control it for the duration of the hospitalization, without prior notice or hearing on the issue of the patient's competency to control that property; and (2) the right of the Commonwealth to appropriate part of the patient's property in satisfaction of the cost of care and maintenance without prior or subsequent hearing on the correctness of the Commonwealth's assessment.

377 F. Supp. 1361, 1362 (E.D. Pa. 1974). The "bottom line" of that opinion was a declaration that §424 of the Pennsylvania Mental Health and Mental Retardation Act of 1966, 50 P.S. §4424, read in conjunction with §501 of that Act, 50 P.S. §4501, offended the equal protection and due process clauses of the Fourteenth Amendment. We issued an injunction (hereinafter "original decree") against the further application of section 424. No appeal was taken.

We were aware when we filed our opinion that compliance with the original decree required major changes in the manner of handling the funds of mental patients in Pennsylvania institutions and that implementation could not be accomplished overnight. [1] We could not have anticipated, however, that almost two-and-one-half years after the original decree we would be filing the present opinion deciding motions interposed by state officials at-

[1] We elected not to hold a further hearing for the purpose of prescribing the steps for implementation of the original decree, deeming it appropriate for the responsible state officials, within the constraints of the decree, to do so.

tacking its validity on the grounds that we had adjudicated a case not before us, and that we had lacked subject matter jurisdiction. Nor could we have perceived that the case would proceed to the point where the Commonwealth would attempt to repudiate the instrument finally devised for implementing the original decree, a consent decree entered on April 4, 1975 (hereinafter "consent decree") on the grounds that the general counsel for the Pennsylvania Department of Welfare who signed the consent decree and submitted it to the Court was unauthorized to do so.

An understanding of the present motions requires a brief description of the interim history of the case. After our July 11, 1974 decision we heard nothing until early 1975 when counsel for plaintiff and an intervening plaintiff [2] moved that the defendants, including Secretary of Welfare Frank S. Beal, be adjudged in contempt for failure to comply with the original decree. There followed a period of negotiation, pursuant to which the parties entered into a stipulation for the consent decree. The consent decree incorporated comprehensive regulations to be adopted by the Pennsylvania Department of Public Welfare as a means of implementing the original decree. The stipulation included provisions for repayment to mental patients of sums withheld pursuant to the statutory procedure which we invalidated. The stipulation was signed on the Commonwealth's behalf by Assistant Attorney General Marx S. Leopold who was General Coun-

[2] The intervening plaintiff was Walter Buress, a patient at Farview State Hospital. Mr. Buress is represented by David Ferleger, Esquire. The original plaintiff is represented by Judy Greenwood, Esquire.

sel for the State Department of Welfare, and by Assistant Attorney General Cecil Maidman who, along with Leopold, had conducted the litigation on the defendants' behalf before the three-judge court. The consent decree was approved by the undersigned on April 4, 1975. The regulations were personally approved by defendant Frank S. Beal, Secretary of Welfare, and approved as to legality by the Pennsylvania Department of Justice. They were published in the *Pennsylvania Bulletin* on April 19, 1975, and certification of publication was filed with the Court.

The consent decree did not end the undersigned's involvement in the matter, for notwithstanding the new regulations it appeared that the problems involved in implementation could benefit from the mediation efforts of the Court, and we embarked upon a series of implementation conferences.[3] *First,* the problems of obtaining suitable guardians for the small funds involved (most banks were uninterested) were not inconsiderable, and a dispute arose between counsel as to the appropriate means of handling the matter. In the many implementation conferences, a variety of options were explored.[4] *Second,* the processing of the many Guardian Petitions required by the two *Vecchione* decrees met with resistance

[3] We took the position, and counsel concurred, that matters of implementation of a three-judge court decree were for the single (assigned) judge, who was Judge Becker.

[4] We discussed, *inter alia,* the creation of an office of guardians within the Governor's office, free from the Revenue Departments' conflict of interest and the Welfare Department's omnibus aegis. Pursuant to an Interim (implementation) Order adopted May 26, 1976, the former role of State Revenue Department Agents in handling patients' funds has been assumed by (public) guardians in the Welfare Department.

from the State Court system which contended that it was understaffed and ill-equipped to handle the enormous volume of necessary petitions.[5] However, through mediation, we were able to stave off a constitutional confrontation between the State and Federal Courts (see n.5) and the State Attorney General, who with the cooperation of the State Court Administrator is now moving ahead with the processing of the *Vecchione* guardian petitions. *Third,* there arose a dispute between counsel as to the Welfare Department's procedure for preliminary determinations of competency pursuant to the consent decree, and we mediated that as well.

The biggest problem, however, did not involve any of the foregoing, but was, as is so often the case, a matter of money. At one of our implementation conferences it appeared that the Commonwealth had withheld from mental patients after the original decree some 9.1 million dollars which it was bound to repay by the terms of the consent decree; *i.e.,* notwithstanding the original decree the revenue agents had continued to seize and appropriate patients' money up until April 4, 1975 with the result that virtually all of it was returned by the revenue agents to the State Treasury general fund in payment of care and maintenance. The Commonwealth was unable at the time to free up the funds for repayment.[5a] Moreover, the Commonwealth began to contend that the repayment of such sums would violate the Eleventh

[5] On December 30, 1975, the State Court Administrator, Judge Alexander F. Barbieri, wrote to Attorney General Robert Kane that, because the State Court system had not had an opportunity to be heard in the *Vecchione* case, the State Court Judges would refuse to entertain *Vecchione* guardian petitions.

[5a] The payback question relates only to pre-April, 1975 funds.

Amendment to the Constitution and that the consent decree was signed by Assistant Attorneys General who lacked power or authorization. Additionally, the Commonwealth began to question the viability of original decree by asserting that counsel in presenting the case had failed to inform the court that Mrs. Vecchione's funds, and the vast bulk of the funds held by Revenue Department Agents (hence affected by the original decree) were funds received from the Social Security Administration (or other federal agencies such as the Railroad Retirement Board) which the Pennsylvania Revenue Department Agents were holding, not subject to section 424, but pursuant to representative payee procedures established by agreement with the Social Security Administration (or other agency). As Mr. Leopold put it in a "Petition for Clarification" filed on July 10, 1975, the Court and plaintiffs and defendants "apparently assumed" that the funds at issue were section 424 funds but they (allegedly) were not.

Further implementation conferences with the undersigned continued.[6] The Commonwealth had designated Deputy Attorney General Donald Murphy, a high level Justice Department official, to act as the Commonwealth's representative, and Mr. Murphy attended the various conferences along with Joseph Kennedy, Esquire, Chief of the Revenue Department's Bureau of Institutional Collections, Paul Carey, the new General Counselor for the Welfare Department, and representatives of the Social Security Administration, including a regional representative, Mr.

[6] In view of the role of the implementation conferences in the case, we have docketed, in a single file, the correspondence during that period.

Thomas L. Toole, and an HEW attorney Larry Bailine. Notwithstanding the allegations of the "Petition for Clarification," the Commonwealth represented at these conferences that the monies in question would be repaid;[6a] moreover, Mr. Toole represented that the Social Security Administration would abide by the *Vecchione* decree.

We heard nothing for some time and had thought that the problems were solved. However, on February 18, 1976, the Commonwealth defendants filed a Motion To Vacate and/or Modify the Consent Decree. At conferences following the filing of the motion the Commonwealth attorneys first took the position that they attacked only the consent decree, not the original decree. In due course, however, it appeared that they were attacking both. Because it appeared that resolution of the issues posed by the Commonwealth's motion might take some time, we continued our implementation conferences, and

[6a] Ultimately the Commonwealth obtained the $9.1 million from the treasury and repaid it to the account of the revenue agents who paid back somewhere between $1.5 and $2 million to patients. Obviously the sums paid to patients were in turn subject to payback for care and maintenance though to date the Commonwealth says that it has collected back less than 50% of the amount due. The remaining funds are likewise subject, upon payback, to liability for care and maintenance subject of course also to such defenses as the patient may interpose. *See Vecchione*, 377 F. Supp. at 1365-66. In due course the Commonwealth should recoup the vast bulk of the funds. But the point of the original opinion and decree of course was the *method* by which the Commonwealth received its maintenance and care, charges—*i.e.*, not by seizure and appropriation but by payment of the funds to patients competent to handle them or to statutory guardians with reimbursement for care and maintenance via (conventional) billing of the responsible party.

worked out two Interim (Implementation) Orders, dated May 26, 1976. The Commonwealth agreed to advance implementation, because it has at all times stated that it agrees with the principles of the July 11, 1974 *Vecchione* opinion, except those sequellae which it is litigating.

The motion to vacate and/or modify is founded upon Fed. R. Civ. P. 60(b). *Inter alia,* it raises those questions about subject matter jurisdiction, the Eleventh Amendment, and the validity of the consent decree to which we have already referred. The plaintiffs filed an answer, not only countering the allegations of the motion, but also suggesting with considerable force that what the defendants were attempting to do was to relitigate a two-year old decree.

A briefing schedule was established, depositions were taken, and on September 30, 1976, a hearing on the motion was held before the three-judge court. The hearing consisted mainly of legal argument: the evidentiary foundation was supplied by a stipulation based upon the various depositions. There was, however, one factual development of note: counsel for the defendants (who, everyone seemed to agree, were authorized Commonwealth representatives) agreed that Messrs. Leopold and Maidman were authorized *to represent* the Commonwealth defendants in the initial three-judge court proceeding and that the defendants were bound by the stipulations which they had made therein. These included stipulations which establish that the funds of the plaintiff Mrs. Vecchione which came from Social Security payments were held by the Revenue Agent pursuant to section 424.

On October 8, 1976, the undersigned, acting on behalf of the three-judge court, entered an order denying

the motion to vacate and/or modify with the notation that our opinion (explaining the decision) would follow. This is that opinion. Inasmuch as the defendants have filed a notice of appeal to the United States Court of Appeals for the Third Circuit, and the record has been transmitted to that Court, this opinion will be transmitted as a (certified) supplement to the record.

The defendants have also moved pending appeal for a stay. Because it is an anomalous motion we describe its prayer:

> Defendants respectfully move this Court for an Order staying the operation of this Court's Order of October 8, 1976, denying Defendants' Motion To Vacate and/or Modify. By this Motion defendants seek to stay the requirements of the Order of April 4, 1975, and reinstate the terms of this Court's two Interim Orders of May 26, 1976, pending determination of the appeal in this case.

We do not perceive that there is any such thing as a Motion To Stay an Order Denying a Motion To Vacate and/or Modify an earlier unappealed-from decree. To the extent such a motion could exist, we fail to perceive how it could do anything but cause a reversion to the status quo ante, *i.e.,* the unenforced but unappealed-from July 11, 1974 decree and/or the April 4, 1975 consent decree. Nor do we believe that the interim orders can alter this view, for those orders were on their face only a device to advance implementation while the defendants were litigating the motion to vacate and/or modify. Furthermore, the standards for a stay pending appeal have not been met. In this regard we note principally that we find no likelihood of success on the merits and that the

grant of a stay, if it were possible, would cause irreparable harm to many of the institutionalized mental patients in Pennsylvania. In view of both of the foregoing factors, the harm which would certainly result to those institutionalized patients outweighs the claimed risk of harm to defendants. Further, we believe that the grant of a stay would be contrary to the public interest. For these reasons and those set forth in this opinion the motion for a stay has been (by an Order filed December 14, 1976) denied.

II. *The Subject Matter Jurisdiction Issue*

One portion of defendants' motion, based upon Fed. R. Civ. P. 60(b)(4), asserts that the consent decree was a void judgment. And in their Reply Memorandum the defendants have conceded that their rule 60(b)(4) attack upon the consent decree is derivatively an attack upon the validity of the original decree, which they regard as having issued mistakenly in the absence of a case or controversy as required by Article III of the Constitution. Defendants claim that the supremacy clause requires that federal law,[7] as opposed to the state law which was adjudged unconstitutional in our decree,[8] be deemed to govern the handling of the plaintiff's social security payments. Those payments were the only personal property which Mrs. Vecchione possessed or received at the time

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[7] The defendants contend that the operative law is to be found in 42 U.S.C. §405(j) (1970) and 20 C.F.R. §404.1601 *et seq.* These are quoted in the Appendix at pp. 28-30 [127a-132a]

[8] 50 P.S. §§4424, 4501 (1969). These sections, hereinafter referred to as 424 and 501 are quoted in the Appendix at pp. 31-32 [132a-135a]

of the 1974 litigation. Defendants also claim that state revenue agents, to the extent they were acting as representative payees of social security benefits, were in practice disregarding the terms of sections 424 and 501. Because the state statutes were not being applied to the plaintiff, defendants maintain, this court was without jurisdiction to decide the case or approve the consent decree.

Although technically no motion to vacate the 1974 judgment has been presented, for the purposes of this phase of the court's opinion we will conform our analysis to defendants' contentions and will consider defendants' claim that the 1974 judgment was void in light of the factual record developed in connection with this motion. This will involve an analysis of the requirements of the Social Security Act and its regulations and a factual inquiry into the activities of state revenue agents who also served as the representative payees of social security benefits.

First of all, we believe that the defendants' theory of the operation of the supremacy clause cannot withstand close examination. Section 424(1) itself provides in plain terms that the authorized state revenue agent

> *shall* . . . take custody of, receive and manage in accordance with this section . . . *any other benefits or payments* to which such a person covered by the provisions of this act may be entitled. [Emphasis supplied.]

On its face, 424 therefore requires a state revenue agent to comply with its terms in handling social security benefits. Obviously, this does not mean that the state may compel the Social Security Administration (SSA) to appoint the state revenue agent as its representative payee.

Nonetheless, when the SSA chooses to make a state revenue agent the recipient of a patient's social security benefits it is within a state's power to require simply that the agent should still act in accordance with his state legislative directives. We believe this to be the reasonable interpretation of 424 in this setting. There is positively nothing in the Social Security Act or the SSA regulations which requires Pennsylvania to offer its revenue agents for unconditional service as representative payees.

We do not, of course, dispute the general proposition that federal law supersedes inconsistent state law. The flaw in the defendants' supremacy argument, however, is their seeming presumption that the operation of any federal law at all on the subject of the appointment of a payee is automatically and necessarily exclusive.[9] It is common knowledge that the administration of the Social Security Program in many respects depends upon federal and state cooperation, and it should not be surprising that the Commonwealth would be entrusted in any given instance to act according to its own procedures. It is our view that when the SSA chose to make the state revenue agent its representative payee, it did so in the belief that the state scheme satisfied the requirements of the

[9] We are aware of the usual operation of the supremacy clause in the context of the Social Security Act, 42 U.S.C. §301 *et seq.* (1970). *See, e.g.*, Townsend v. Swank, 404 U.S. 282 (1971); Lewis v. Martin, 397 U.S. 552 (1970); King v. Smith, 392 U.S. 309 (1968). The present case is different in that the federal standards do not at all require the state revenue agents to serve as representative payees. The SSA may or may not appoint these agents, and would do so in any event only after its own evaluation of the capacity of those agents to meet SSA requirements.

federal regulations.[10] Contrary to defendants' assertions, this interpretation does not imply that the SSA forfeited the right to hold the agent accountable to it for any possible misappropriation.

[10] That such a flexible, cooperative relationship existed between the SSA and the Commonwealth is illustrated by the response of the SSA to this court's 1974 decision and 1975 consent decree. Letter from SSA Regional Representative Edmund J. Sabatini to Honorable Edward R. Becker, August 6, 1975:

> Dear Judge Becker:
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> As requested in the meeting of August 4, 1975, in your office, regarding the above case, you are advised that this confirms the position of the Department of Health, Education, and Welfare, Social Security Administration as stated by Thomas L. Toole, Assistant Regional Representative (Program), Mid-Atlantic Program Center, Philadelphia, Pennsylvania, in that when a Social Security beneficiary enters a Pennsylvania mental institution benefits will be continued to him pending a decision as to his competency. If the Commonwealth's preliminary decision is that he is competent we will continue to pay him direct. If the preliminary decision is that he is incompetent the Social Security Administration will ascertain if there is a spouse or relative who has shown interest in the beneficiary's welfare and will assume the responsibility of a Representative Payee. If so, we will approve that person as Representative Payee. If there is no such qualified person we will continue the payment of benefits to the beneficiary until a legal guardian is appointed and files as Representative Payee.
>
> In the transitional cases, we will continue to pay the Revenue Agent, the present payee, until we receive a preliminary decision as to the beneficiary's competency. If the Commonwealth's decision is that he is competent, we will obtain an application from the beneficiary and pay him direct at the address he designates. If the preliminary decision is that he is incompetent., we will approve the legal guardian as payee as soon as he files an application.

We do not however, rely upon this letter for our decision.

The federal regulations and the federal statute are on their face consistent with 424 in all details but possibly one.[11] The SSA regulations provide that the SSA shall make its own determination of a patient's competency.[12] Defendants observe that at the point a patient's personal assets exceeded $2,500 he or she would be entitled to an adjudication of competency under 424(4) and to the appointment of a guardian in the event he or she was declared incompetent. Defendants then conclude that the federal regulations make the SSA's decision on competency the legally operative one for purposes of appointing a representative payee, thereupon suggesting that the federal law should prevail and that the revenue agent must continue to receive payments regardless of the appointment of a guardian for state purposes. This conclusion fails to recognize that the revenue agent, upon receiving an appointment as the payee of the SSA, would not be absolutely and permanently bound to continue in that capacity. In the event a state guardian were appointed,

[11] Defendants have also contended, however, that the SSA regulations conflict with the state law procedures on the duty of a representative payee to apply social security payments to the costs of institutional care and maintenance. *See* 20 C.F.R. §404.-1606. They assert that federal law *requires* that the "highest priority" shall be accorded such institutional charges, etc. Defendants then distinguish this federal requirement from state law, which merely allows for such payments. As a practical matter, however, it seems fatuous to suggest that the state law authorization to state revenue agents was not on this point wholly adequate to meet the institutional maintenance requirements of 20 C.F.R. §404.1606. Once again the clear indication is that the appointment of the state revenue agent as representative payee was based upon the view that his state law duties were wholly sufficient for federal purposes.

[12] 20 C.F.R. §404.1601.

the revenue agent's duties as payee could simply terminate leaving the SSA to accept the guardian as its representative payee or look elsewhere.

In considering the evidence advanced in connection with the present motion, we believe that social security benefits paid to revenue agents were in fact administered in accordance with 424. Even defendants' witness, Donald D. Dougherty, the SSA's District Manager in Harrisburg, admitted in his deposition that he knew prior to the 1974 litigation that the state revenue agents who were appointed as representative payees had "concurrent duties" under state law.[13] These duties included an obligation under 424(4) to seek a guardian in the event that a patient's assets exceeded $2,500. Furthermore, it has not even been disputed that the plaintiff's funds were placed into a continuing $100 petty cash account and a $500

[13] The relevant portion of the deposition of Donald D. Dougherty discussing the duties of revenue agents/representative payees is as follows (Dougherty Deposition at 32-33):

Q. But you knew and you have known at the time you have been appointing the revenue agents that they had *additional responsibilities and concurrent responsibilities* under state law?

A. Yes.

Q. So you knew, for example that the revenue agents under state law had to keep $100 for the patient's personal needs, is that right?

A. Yes.

Q. And you knew that under state law if the person had an estate of more than $2,500 the revenue agent had a responsibility to ask the Department of Justice for appointment of guardian, is that right?

A. Yes.

This testimony, we believe, reinforces our view of the flexible interplay between federal and state law.

reserve account, precisely in the fashion prescribed by 424(2). There is no suggestion whatever that this procedure was required by the SSA regulations or the Social Security Act. [14]

Another factual element of defendants' voidness theory must also be discussed. Counsel for defendants have insisted upon the existence of an "agreement" between SSA and the Commonwealth rendering 424 and 501 inapplicable to the treatment of social security payments by revenue agents. The significance of this asserted long-standing agreement between state and federal administrators would in any event be uncertain because of the broad directive of section 424(1) and because of the evidence set forth above suggesting actual compliance with 424 by revenue agents/representative payees. But in addition to all this, the deposition testimony of Deputy Attorney General Donald J. Murphy, a Justice Department representative during the implementation conferences and a one-time director of the Department of Institutional Collections within the Welfare Department, reveals that there was not even a specifically ascertainable

[14] Defendants' witness Raymond Foote, a revenue agent at Farview State Hospital since 1971 testified on cross-examination that he wrote, in response to a letter asking whether the 424 and 501 procedures were currently being followed in handling entitlements including social security benefits, that such procedures had been followed up to the *Vecchione* decision. Foote Deposition at 13-16. Further, Mr. Foote was of the opinion as a revenue agent that in handling the plaintiff intervenor's social security payments he had followed the state procedures. Foote Deposition at 16-17. Inasmuch as Mr. Foote should be expected to know what his employment duties are, his opinion that the state law which was described to him was operative is valid evidence that the defendants' theory was not in practice recognized.

beginning to the "agreement" which was at best no more than an informal understanding. Moreover, Murphy testified: (1) that his successor in the Bureau of Collections who served in that position prior to the 1974 *Vecchione* litigation expressed his belief that the so-called agreement was defunct and (2) that an SSA district manager indicated in a letter dated December 21, 1972, that there was no operative understanding and that section 424 was to be followed. [15] If these administrative officials denied the

[15] Donald J. Murphy Deposition at 13-14:

A. . . . *Joe Kennedy, my successor as director of Institutional Collections, called me and indicated to me that he was under the impression the agreement with the Social Security Administration had been, as he put it, discarded.*

I asked him to send me a copy of anything he had to confirm that, and he sent to me what you have attached here as pages two and three of the exhibit, which is *a letter from John Ludwig, district manager of Social Security Administration for the Central Region, to Joe Kennedy as in his capacity as Bureau of Institutional Collections under date of December 21, 1972, and indicating that the so-called understanding used for the past 15 years has been disregarded by the Social Security Administration, and it states the question that follows is what guides do we follow now. The answer would be state law, especially the MH-MR Act*, and the guides and procedures that Social Security has adopted nationwide, and the results of the on-site review program.

When I received that I called either John Ludwig or Tom Toole, the Pennsylvaia supervisor for the Social Security Administration, and asked him if this meant that the provisions of section 424 of the Mental Health Act were what we were now operating under. And he indicated no. And I indicated that if so, it would appear that the revenue agent would have to be designated representative payee in any case, or in every case, rgardless of whether or not there was available a spouse, parent or next friend outside of the

very existence of an understanding which defendants say must override the limitation on a revenue agent's authority in 424, it should not be surprising that we decline to place any confidence in the defendants' reference to it.

Based upon the record which has been presented to us in connection with the present motion, we believe that the operation of sections 424 and 501 was in fact a live issue in the 1974 *Vecchione* case. We are persuaded to this result, in sum, both because the social security statute and regulations (and any claimed agreement) did not through the supremacy clause forbid a state revenue agent to function under the 424 procedure, and because the evidence demonstrates that responsible officials for the SSA and the Commonwealth themselves recognized that 424, consistently with its plain meaning, should be and was in fact followed even when the revenue agent was serving as a representative payee for social security payments. It may of course be true that the SSA could have been profitably joined as a defendant in the 1974 action. However, because we find that revenue agents/representative payees were operating under state law, there did indeed exist a case or controversy and it was therefore within the Article III jurisdiction of this court to adjudge sections 424 and 501 unconstitutional. To the extent defendants' motion to vacate or modify the 1975 consent

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institution. He indicated yes, and to the extent that we were still choosing other than the revenue agent, they were operating under the provisions of the Social Security Act and under the vestiges of the agreement.

We observe that Murphy's last remark does not really point to an inconsistency in the view that 424 operates as to all revenue agents who have in fact been appointed as representative payees. Nothing in state law, of course, could force the SSA to make such appointments.

decree is construed as a 60(b)(4) motion asserting the voidness of the 1974 judgment it must thus be denied.[16]

B. *The Availability of 60(b)(4) Relief*

Even apart from our finding that the defendants' denial of the plaintiff's standing is incorrect, we find ourselves in disagreement with defendants' position on the availability of 60(b)(4) relief in the circumstances of this case. At one end of the spectrum is the self-explanatory rule that a judgment rendered in the absence of subject-matter jurisdiction is a legal nullity, unable to ripen with age into a valid judgment. *See Misco Leasing, Inc. v. Vaughn,* 450 F.2d 257, 260 (10th Cir. 1971). At the other end is the principle, sometimes referred to as the bootstrap principle, that a court possesses the jurisdiction to decide whether it has subject-matter jurisdiction. *See, e.g., Chicot County Drainage District v. Baxter State Bank,* 308 U.S. 371 (1940) (requiring only an opportunity to litigate at the outset the jurisdictional issue); *Stoll v. Gottlieb,* 305 U.S. 165 (1938); Dobbs, *Beyond Bootstrap: Foreclosing The Issue of Subject Matter Jurisdiction Before Final Judgment,* 51 Minn. L. Rev. 491 (1967) (hereinafter cited as Dobbs); *cf. United States v. United Mine Workers,* 330 U.S. 258 (1947).

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[16] There is an independent and equally sufficient ground for sustaining subject matter jurisdiction. The defendants' stipulation to portions of the complaint established that the funds held by the Revenue Agent were held pursuant to section 424. Factual Stipulations, filed September 4, 1973. It has been conceded that Messrs. Leopold and Maidman had authority to conduct that litigation. *See* note 19 *infra.* We think these stipulations establish our subject matter jurisdiction. We have relied upon this theory secondarily because the fuller record discussed in the text itself puts the matter to rest.

The Supreme Court has not been at all times pellucid in reconciling the above principles. From a few of the vintage cases it would appear that where a defect in subject-matter jurisdiction is shown on the face of the record an untimely attempt to void a judgment could be upheld. *See American Fire & Casualty Co. v. Finn,* 341 U.S. 6, 14-16 (1951); *Mansfield, C. & L. M. Ry. Co. v. Swan,* 111 U.S. 379, 386 (1884); *Capron v. Van Noorden,* 6 U.S. (2 Cranch) 125 (1804); Dobbs, 508-09 (criticizing the limitations on absolute finality). Manifestly, the present case is not one which falls into this general category, both because nothing in the original record suggests the defect which defendants have sought to prove and because former counsel for defendants have formally admitted the facts pleaded in that portion of the complaint which alleged the subjection of the plaintiff's social security funds to sections 424 and 501.[17] Whatever the correct synthesis of the numerous intricacies of the finality issue, we do believe that where the facts giving rise to subject-matter jurisdiction have themselves been established in a federal court, that court's judgment is not subject to attack for voidness after the time for appeal has passed. *See Chicot County Drainage District, supra; Stoll v. Gotlieb, supra; Universal Display & Sign Co. v. Del Mar News Agency,* 22 F.R. Ser. 2d 158, 159 (3d Cir. 1976); *Lubben v. Selective Service System,* 453 F.2d 645, 649 (1st Cir. 1972).[18]

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[17] *See* note 16 *supra.*

[18] We note also that even if their claims were true, the decision in the 1974 action would be valid because the defendants, by whatever statutory authority, would still have been engaged in violating plaintiff's constitutional rights. What defendants are really objecting to, therefore, is the technical standing of plaintiff to question those particular statutory sections which were declared unconstitutional. Standing is, of course, ordinarily to be determined from the pleadings. Schiaffo v. Helstoski, 492 F. 2d 413 (3d Cir. 1974). Our 1974 decision would certainly not appear to evidence the kind of "usurpation of power" (*Lubben, supra* at 649) required to upset a previous judgment, for there was, even according to defendants' view, power to decide the case. We must also observe that the distinction sometimes made between strictly jurisdictional issues and so-called quasi-jurisdictional issues is not particularly helpful in this case. *See* Noble v. Union River Logging R.R., 147 U.S. 165, 173 (1893) (outlining the distinction). First, as already stated, we do not believe the claimed defect goes strictly to our "power" to decide the case and, secondly, we believe that the issue now raised was in any event finally resolved in 1974 given the circumstances of this case.

As the foregoing discussion suggests, we would not be required to reopen the judgment under rule 60(b)(4) even if there were now found to be substance to defendants' factual assertions. Our finding in 1974 that sections 424 and 501 in fact violated plaintiff's constitutional rights arose only after the question of the applicability of 424 and 501 had been squarely faced and then put to rest by the former counsel for defendants.[19]

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[19] Present counsel for defendants do not now contest the authority of their predecessors to conduct the 1974 litigation (although they contest their signing the consent decree), hence present counsel concede that previous counsel had authority to stipulate to paragraphs of the complaint. *See* note 16, *supra.* We would in any event, be gravely concerned about any view that would bind us to regard a violation of the internal authorization procedures of the Commonwealth Department of Justice as a basis for invalidating a factual stipulation entered into in the course of litigation. The Justice Department's responsibility is to supervise its duly appointed assistant attorneys general during litigation and not years afterward, and to stand behind repre-

We are guided and supported in this view by *DiFrischia v. New York Central R. R.*, 279 F.2d 141 (3d Cir. 1960),[20] involving the existence *vel non* of diversity jurisdiction. Counsel for the defendant in that case at first asserted the lack of subject-matter jurisdiction and then stipulated to its existence. The Court of Appeals reversed the district court for granting defendants' motion to amend its answer to reassert the jurisdictional objection after litigation had progressed to the verge of trial. The court's observations have special meaning in the present case:

> [T]he defendant had its opportunity to have the [jurisdictional] issue heard and to present its position but chose to admit the allegations. Thereafter it fully participated in the appropriate discovery and pretrial procedures preparatory to trial of the action on the merits. . . . A defendant may not play fast and loose with the judicial machinery and deceive the courts.

sentations and stipulations which its legal representatives made in a court of law.

Obviously, state law may be an important guide in determining whether an attorney has the power to enter into a settlement or stipulation in some cases. But at the point where following such law would compromise the ability of federal courts to function effectively in a civil rights suit involving the state as a party, state law need not invariably be followed.

[20] Even Misco Leasing, Inc. v. Vaughn, 450 F.2d 257, 260 (10 Cir. 1971), the case which defendants seem to cite for the proposition that a judgment void when rendered is forever a nullity, qualified its observation with the following pronouncement: "We are not asked to consider whether under any particular circumstances a movant under Rule 60(b) may be estopped or precluded from filing such a motion." *Misco* was, moreover, a case involving a 60(b)(4) attack upon a *default judgment* raising a personal jurisdiction issue which no court had previously addressed in any form. We thus believe that our present determination is consistent with the theory espoused in *Misco*, for even if a "void" judgment can be attacked under rule 60(b)(4) at any time, the attack will not be successful where, for instance, the jurisdictional issue has already been litigated and decided.

We think *DiFrischia* may be placed in the line of cases upholding a court's jurisdiction to determine its own jurisdiction.[21] It is admittedly unusual in its holding that the trial court's jurisdictional determination became unassailable even before trial. But *DiFrischia* is important also because it expresses a candid sensitivity to the inequities which may stem from a blind adherence to the mistaken notion that an attack upon subject-matter jurisdiction is forever available in all circumstances.[22]

Not unlike the conduct of defendant in *DiFrischia*, the defendants in the present matter were represented by counsel who chose to conduct their 1974 case by stipulating to facts which established the plaintiff's standing to attack the Pennsylvania statutes. Thus, by their own actions defendants obviated any possible need on plaintiff's part to seek to prove affirmatively her standing in 1974, and then, if a defect appeared in the formulation of the suit, to seek to join additional plaintiffs or defendants or to press for class certification. To grant defendants' motion now (even if they could prove that 424 and 501 were in fact inapplicable) would confer upon the Common-

[21] *DiFrischia* has also been described in an estoppel framework. Stephens, *Estoppel to Deny Federal Jurisdiction—Klee and DiFrischia Break Ground*, 68 *Dick. L. Rev.* 39 (1964).

[22] *See* Greenbaum v. United States, 360 F. Supp. 784, 788-89 (1973).

wealth an unnecessary two-year moratorium in disregard of the very important and to date undisputed constitutional rights of patients in Pennsylvania mental institutions. The reasons for foreclosing the jurisdictional attack are notably stronger here than in *DiFrischia* in that defendants' motion arises nearly two years after litigation had concluded and about ten months after the implementing regulations had been published in the *Pennsylvania Bulletin* following Justice Department review,[23] and where it appears that the motivation for the present motion is to minimize the cost of noncompliance with the court's decree. Thus, unavailability of 60(b)(4) relief under the circumstances of this case is an additional though independent ground for denial of defendants' motion to vacate and/or modify.[24]

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[23] Even defendants' current counsel do not assert that the underlying basis of their present motion was discoverable only after the 1974 litigation, for defendants' argument is based upon what they now fashion as the at-alltimes operative facts about the activities of state revenue agents handling social security monies.

Also, any purported distinction between an active dispute of the jurisdictional facts and the stipulation is, as *DiFrischia* points out (at 144), "untenable for . . . such inquiry was made unnecessary by the admission of defendant itself. . . ."

[24] We note also that many of the cases which have upheld a court's jurisdiction to determine its own jurisdiction involved collateral attacks invoking the full faith and credit clause. *See, e.g., Durfee v. Duke,* 375 U.S. 106 (1963). The rationale articulated in those cases is that the original litigation is *res judicata* on the issue of subject matter jurisdiction. As observed in *Jordan v. Gilligan,* 500 F.2d 701, 710 (6th Cir. 1974), *cert. denied,* 421 U.S. 991 (1975), in a direct 60(b) attack upon a judgment, the principle of *res judicata* does not appear to be applicable. To the extent that *Jordan* suggests that all judgments are subject

III. *The Eleventh Amendment Issue*

In addition to questioning plaintiff's standing as a basis for invalidating the 1975 consent decree, the defendants also assert that the consent decree should be voided because it now stands in violation of the sovereign immunity of Pennsylvania as guaranteed by the Eleventh Amendment. With this conclusion we must also disagree.

What the defendants now dispute is the sum of the financial obligations incurred *after* the original decree of July 11, 1974. All of these obligations are, therefore, prospective in nature and have come about only because the Commonwealth, for whatever reason, continued to apply 424 and 501 after the injunction had issued. In *Edelman v. Jordan,* 415 U.S. 651, 667-68 (1974), the court found the Eleventh Amendment to be a bar only to

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at all times to 60(b)(4) assault because *res judicata* does not apply, we must disagree. *Cf. Jackson v. Irving Trust Co.,* 311 U.S. 494, 503 (1941) (motion to set aside decree denied where defendant had opportunity to contest jurisdictional defect).

A judgment which issues without subject matter jurisdiction is void, and the principle of *res judicata* does not of its own force breathe vitality into the judgment. What has justified the Court's repeated reference to *res judicata* in jurisdictional collateral attack cases is the existence of jurisdiction to decide jurisdiction, and it is this principle, not *res judicata,* which has had the effect of validating as final what might at one point have been a "void" judgment. *Cf.* United States v. United Mine Workers, 330 U.S. 258 (1974). A court has the same jurisdiction to determine its jurisdiction whether its judgment is attacked collaterally or directly, and the test of whether a judgment should be reopened after the time for appeal has passed should in all important respects be the same in both situations. *See* Dobbs at 496.

orders requiring retroactive expenditure of state funds.[25] The payments required either under the original order or the 1975 consent decree in this case are merely ancillary to the implementation of prospective relief and therefore fall within the exception to the immunity rule.[26] See *McAuliffe v. Carlson,* 520 F.2d 1305, 1308 (2d Cir. 1975), *cert. denied,* 96 S.Ct. 3199 (1976). We conclude therefore, that neither the original decree of 1974 nor the 1975 consent decree are void because of impingement upon Pennsylvania's sovereign immunity.[27]

IV. *Other 60(b) Provisions*

Having disposed of the defendants' 60(b)(4) voidness motions, we turn now to their other motions under rule 60(b).[28] These remaining motions are, as best we

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[25] Skehan v. Board of Trustees, 501 F.2d 31, 43 n. 7 (1974), *vacated,* 421 U.S. 983 (1975), *on remand,* 538 F.2d 53 (1976) (*en banc*) instructs that *Edelman* applies to fourteenth amendment claims as well as state law or federal statutory claims.

[26] The 1975 consent order is quoted in the Appendix at pp. 33-34 [135a-137a]

[27] Although we have denied the availability of 60(b)(4) relief with respect to defendants' claims that the plaintiff lacked standing to attack sections 424 and 501, we need not extend the principles enunciated in that discussion to the claim that the consent decree violated the Eleventh Amendment. Suffice it to say that we perceive significant differences in these respective claims. Sovereign immunity is obviously not the kind of issue which can ordinarily be litigated and found as a fact, nor is it one which counsel can influence by their conduct. *Cf.* United States Fidelity & Guaranty Co., 309 U.S. 506, 513 (1940) (involving the immunity of an Indian nation from suit).

[28] These motions fit, so defendants contend, under the classification 60(b)(1), (5) and (6), which provide as follows:

can ascertain, based upon the following contentions: (1) that the original decree and hence the 1975 consent decree arose from a mistake about the applicability of 424 and 501; (2) that it is no longer equitable for the original decree and/or the consent decree to have continuing prospective application; and (3) that there are "other reasons" for granting relief including the asserted lack of authority of counsel to enter into the consent decree.

In evaluating these claims, we point out that relief under the above-cited sections of rule 60(b) is not a substitute for appeal. Such 60(b) motions should succeed only when the granting of relief would serve the interests of justice. *See* 7 *J. Moore, Federal Practice* ¶60.19, at 237 (1975) (hereinafter cited as *Moore*). Certainly, we should not disregard the potentially damaging impact of 60(b) relief upon the party who, through litigation, had obtained what appeared to be a final judgment, for we are in this respect guided by equitable principles. *See Bridoux v. Eastern Air Lines,* 214 F.2d 207, 210 (D.C. Cir. 1954), *cert. denied,* 348 U.S. 821 (1954); *Tozer v.*

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; . . . (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment order, or proceeding was entered or taken. . . .

Charles A. Krause Milling Co., 189 F.2d 242, 246 (3d Cir. 1951); 7 *Moore*, ¶60.19, at 237-39.

In turning to the merits of defendants' claims we need not linger over their 60(b) (1) assertion that this court and all persons involved in the 1974 litigation were mistaken about the application of 424 and 501.[29] We have already determined that there was no mistake at all either at the time of judgment or at the time of the consent decree. Furthermore, we are not concerned about the correctness or incorrectness of defendants' claims about the inapplicability of state law because of our assessment of the inequities which would arise in permitting the rights of mental patients to be neutralized unnecessarily over a two-year period. As discussed above, the claimed mistake, had it been a mistake, would in all likelihood have been avoided but for defendants' own concessions.

We likewise do not hesitate to deny defendants' 60(b) (5) motion asserting that it is no longer equitable for the judgment to have prospective application. It is our view that the original decree has continuing, albeit delayed, vitality in its interpretation of defendants' constitutional rights which to date remain unchanged by events. *See* 7 *Moore* ¶60.18[8], at 222-223; *cf. id.* ¶60.26[4], at 327-28; *cf. Wallace Clark & Co., Inc. v. Acheson Industries, Inc.*, 394 F.Supp. 393, 395 and n.4 (S.D.N.Y. 1975) (Weinfeld, J.) (rule 60(b) (5) contemplates relief due to later change in law), *aff'd.*, 532 F.2d 846 (2d Cir. 1976). In this respect, too, our conclusion would be the same even if defendants' theory of 424 and 501 were accurate, for the underlying constitutional rights at issue

[29] Defendants are really asserting a mistake in the 1974 decision and are also therefore outside the one year period provided in rule 60(b).

in 1974 and their applicability here have not been questioned.[30]

Finally, we will presume that it is through the vehicle of rule 60(b) (6) that defendants wish to assert their argument that the consent decree was unauthorized and therefore should be vacated. If defendants' assertion were correct for purposes of federal law (and we do not suggest that it is), there has still been no representation that the 1975 consent decree is unnecessary in the protection of adjudicated rights nor has there been a showing that the decree is by its terms inefficient. In this respect the consent decree is really no different from the 1974 decision which, as observed above, has never been attacked by the defendants as an incorrect articulation of constitutional principle. To the contrary, they have agreed that it is correct, while seeking to evade its impact by means of the arguments described above.

Guided as we now are by equitable considerations, we decline to wipe the slate clean, as it were, of all of defendants' obligations incurred since the original decree and as embodied in the consent decree. Defendants through their original counsel certainly had a fair opportunity to evaluate the terms of the consent decree

[30] Defendants have also argued that it is impossible for them to obtain judicial declarations of incompetency because of the refusal of the Pennsylvania judiciary to entertain the necessary petitions. Since defendants have interposed that argument, progress has been made (as observed in our preliminary statement), and indications are that the Pennsylvania courts are now moving ahead on the *Vecchione* petitions. But we do not concede that such a delay is any justification for the continuing use of 424 and 501. The simple answer is that the Commonwealth should not act under those sections if it cannot comply with constitutional requirements.

which they not only approved but published in the *Pennsylvania Bulletin*.[31] In such circumstances the opposing parties in interest should not be expected to absorb the full burden of the claimed failure by defendants' original counsel to follow Justice Department authorization procedures. We further believe it is the responsibility of the Department of Justice, not the plaintiff's counsel or this court, to see that proper authorizations have issued.

In conclusion, the defendants' motion under rule 60(b)(1), (5) and (6) are denied, as are defendants' motions under 60(b)(4).

BY THE COURT:

(s) Edward R. Becker
Edward R. Becker,
J.

APPROVED BY:

(s) James Hunter
James Hunter,
Circuit Judge

(s) E. Mac Troutman
E. Mac Troutman,
District Judge

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[31] We think it sufficient that the Pennsylvania Department of Justice was plainly aware of the consent decree at or near its outset. Copies of the motion for contempt (which led to the 1975 consent decree) were served upon Robert Kane, Attorney General of the Commonwealth. Defendant Frank S. Beal, Secretary of the Department of Welfare, was apprised by Marx Leopold of that decree. Factual Stipulations, filed October 1, 1976, ¶¶14, 23. By anyone's description the Commonwealth should not have been surprised by the 1975 decree. Beal thereafter signed the certification of publication of the decreed regulations and those regulations were reviewed by the Justice Department. F.S. ¶¶ 25, 27.

APPENDIX

42 U.S.C. §405(1) (1970) provides:

(j) When it appears to the Secretary that the interest of an applicant entitled to a payment would be served thereby, certification of payment may be made, regardless of the legal competency or incompetency of the individual entitled thereto, either for direct payment to such applicant, or for his use and benefit to a relative or some other person.

20 C.F.R. §§404.1601-1610 provide:

§404.1601 Payments on behalf of an individual.

When it appears to the Administration that the interest of a beneficiary entitled to a payment under title II of the Act would be served thereby, certification of payment may be made by the Administration, regardless of the legal competency or incompetency of the beneficiary entitled thereto, either for direct payment to such beneficiary, or for his use and benefit to a relative or some other person as the "representative payee" of the beneficiary. When it appears that an individual who is receiving benefit payments may be incapable of managing such payments in his own interest, the Administration shall, if such individual is age 18 or over and has not been adjudged legally incompetent, continue payments to such individual pending a determination as to his capacity to manage benefit payments and the selection of a representative payee.

§404.1602 Submission of evidence by representative payee.

Before any amount shall be certified for payment to any relative or other person as representative payee for

and on behalf of a beneficiary, such relative or other person shall submit to the Administration such evidence as it may require of his relationship to, or his responsibility for the care of, the beneficiary on whose behalf payment is to be made, or of his authority to receive such payment. The Administration may, at any time thereafter, require evidence of the continued existence of such relationship, responsibility or authority. If any such relative or other person fails to submit the required evidence within a reasonable period of time after it is requested, no further payments shall be certified to him on behalf of the beneficiary unless for good cause shown, the default of such relative or other person is excused by the Administration, and the required evidence is thereafter submitted.

§404.1603 Responsibility of representative payee.

A relative or other person to whom certification of payment is made on behalf of a beneficiary as representative payee shall, subject to review by the Administration and to such requirements as it may from time to time prescribe, apply the payments certified to him on behalf of a beneficiary only for the use and benefit of such beneficiary in the manner and for the purposes determined by him to be in the beneficiary's best interest.

§404.1604 Use of benefits for current maintenance.

Payments certified to a relative or other person on behalf of a beneficiary shall be considered as having been applied for the use and benefit of the beneficiary when they are used for the beneficiary's current maintenance—i.e., to replace current income lost because of the disability, retirement, or death of the insured individual. Where a beneficiary is receiving care in an institution (see §404.-1606), current maintenance shall include the customary

charges made by the institution to individuals it provides with care and services like those it provides the beneficiary and charges made for current and foreseeable needs of the beneficiary which are not met by the institution.

§404.1605 Conservation and investment of payments.

Payments certified to a relative or other person on behalf of a beneficiary which are not needed for the current maintenance of the beneficiary except as they may be used pursuant to §404.1607, shall be conserved or invested on the beneficiary's behalf. Preferred investments are U. S. Savings Bonds, but such funds may also be invested in accordance with the rules applicable to investment of trust estates by trustees. For example, surplus funds may be deposited in an interest or dividend bearing account in a bank or trust company or in a savings and loan association if the account is either federally insured or is otherwise insured in accordance with State law requirements. Surplus funds deposited in an interest or dividend bearing account in a bank or trust company or in a savings and loan association must be in a form of account which clearly shows that the representative payee has only a fiduciary, and not a personal, interest in the funds. . . . A representative payee who is the legally appointed guardian or fiduciary of the beneficiary may also register U. S. Savings Bonds purchased with funds from title II payments in accordance with applicable regulations of the U. S. Treasury Department (31 C.F.R. 315.5 through 315.8). Any other approved investment of the beneficiary's funds made by the representative payee must clearly show that the payee holds the property in trust for the beneficiary.

§404.1606 Use of benefits for beneficiary in institution.

Where a beneficiary is confined in a Federal, State or private institution because of mental or physical incapacity, the relative or other person to whom payments are certified on behalf of the beneficiary shall give highest priority to expenditure of the payments for the current maintenance needs of the beneficiary, including the customary charges made by the institution (see §404.1604) in providing care and maintenance. It is considered in the best interests of the beneficiary for the relative or other person to whom payments are certified on the beneficiary's behalf to allocate expenditure of the payments so certified in a manner which will facilitate the beneficiary's earliest possible rehabilitation or release from the institution or which otherwise will help him live as normal a life as practicable in the institutional environment.

§404.1607 Support of legally dependent spouse, child, or parent.

If current maintenance needs of a beneficiary are being reasonably met, a relative or other person to whom payments are certified as representative payee on behalf of the beneficiary may use part of the payments so certified for the support of the legally dependent spouse, a legally dependent child, or a legally dependent parent of the beneficiary.

§404.1608 Claims of creditors.

A relative or other person to whom payments under Title II of the Act are certified as representative payee on behalf of a beneficiary may not be required to use such payments to discharge an indebtedness of the beneficiary which was incurred before the first month for which

payments are certified to a relative or other person on the beneficiary's behalf. In no case, however, may such payee use such payments to discharge such indebtedness of the beneficiary unless the current and reasonably foreseeable future needs of the beneficiary are otherwise provided for.

§404.1609 Accountability.

A relative or other person to whom payments are certified as representative payee on behalf of a beneficiary shall submit a written report in such form and at such times as the Administration may require, accounting for the payments certified to him on behalf of the beneficiary unless such payee is a court-appointed fiduciary and, as such, is required to make an annual accounting to the court, in which case a true copy of each such accounts filed with the court may be submitted in lieu of the accounting form prescribed by the Administration. If any such relative or other person fails to submit the required accounting within a reasonable period of time after it is requested, no further payments shall be certified to him on behalf of the beneficiary unless for good cause shown, the default of such relative or other person is excused by the Administration, and the required accounting is thereafter submitted.

§404.1610 Transfer of accumulated benefit payments.

A representative payee who has conserved or invested funds from Title II payments certified to him on behalf of a beneficiary shall, upon direction of the Administration, transfer any such funds (including interest earned from investment of such funds) to a successor payee appointed by the Administration, or, at the option of the Administration, shall transfer such funds, including in-

terest, to the Administration for recertification to a successor payee or to the beneficiary.

50 P.S. §§4424, 4501 (1969) provide:

§4424. Funds of persons admitted or committed to State operated facilities

Where no guardian has been appointed for a mentally disabled person admitted or committed to a State operated facility all money and other personal property of such person shall be handled in the following manner, unless the director determines that such person's recovery or well-being will be promoted by his own handling of such money or personal property:

(1) The authorized agent of the Department of Revenue shall, without application to any court, take custody of, receive and manage in accordance with this section any money or other personal property in such person's possession at the time he is admitted to a facility and any gifts, legacies, pensions, insurance payments, retirement benefits or payments, old age and survivors' insurance, or any other benefits or payments to which such person covered by the provisions of this act may be entitled.

(2) The revenue agent shall, upon the director's request, turn over to the director the sum of one hundred dollars ($100) to be used as such person's petty cash fund. Funds so held by the director shall be disbursed at his discretion to promote the welfare of such person. The revenue agent shall, upon the director's request, restore the balance in each such person's petty cash fund to one hundred dollars ($100). For special purposes, the director may request funds for such person up to five hundred dollars ($500).

(3) Unless a guardian has been appointed and qualified, the revenue agent shall hold, apply and dispose of all funds in accordance with regulations promulgated by the department.

(4) Whenever the money and other personal property of such person exceeds two thousand five hundred dollars ($2,500) in value, the revenue agent shall request the Department of Justice to apply for the appointment of a guardian of such person's estate in accordance with the act of February 28, 1956 (P.L. 1154), known as the "Incompetents' Estates Act of 1955."

(5) When such guardian has been appointed and qualified pursuant to this section or in any other manner, he shall be entitled to receive from the revenue agent all money and other personal property in the custody of such revenue agent belonging to the person for whom he has been appointed guardian. All funds transmitted to the guardian shall be accompanied by a statement certified as true and correct and setting forth, in detail, a full accounting of such person's funds.

(6) Whenever such money and other personal property exceed two thousand five hundred dollars ($2,500) in value and the court rules that a guardianship is not appropriate, then such money and other personal property shall be handled in accordance with this section.

(7) The revenue agent and the director each shall at all times have on file with the Secretary of the Commonwealth a bond at least equal to the total value of all such money and other personal property in his possession.

(8) The revenue agent and the director shall each open interest bearing accounts in federally insured banks, banking institutions, trust companies or savings and loan

associations and shall deposit therein all such moneys in their possession. Amounts on deposit in such accounts shall not exceed the amount of federal insurance coverage. All interest earned on such accounts less costs of administering such accounts shall be allocated to each individual person's account in the same proportion that said account bears to the total of all accounts at the time the interest is calculated.

(9) All moneys and other personal property of any mentally disabled person admitted or committed to a State operated facility which is held by the director or revenue agent at the time this act becomes effective shall be managed in accordance with the provisions of this section after said date. This paragraph shall not apply to interest that is accrued on such person's funds prior to the effective date of this act.

(10) Upon the death of any such person the director shall transfer to the revenue agent all money and other personal property belonging to such person. The revenue agent shall continue to serve as provided in this section, with respect to any sums due such person as of the date of his death, or as burial allowances. After the payment of burial expenses and satisfaction of such person's obligation to the Commonwealth, the balance of such funds, if any, shall be disposed of in accordance with existing statutes governing decedents' estates except those veterans' benefits which by federal law are to be returned to the United States.

§4501. Liability of mentally disabled persons

Whenever public funds are expended under any provision of this act on behalf of a mentally disabled person, the governmental body expending such funds may re-

cover the same from such person subject to the regulations of the department and for this purpose liability is hereby imposed upon such person admitted, committed or otherwise receiving any service or benefit under this act for all costs, payments or expenditures with reference thereto, including but not being limited to the costs of admission or commitment, transportation, treatment, training, maintenance, complete care, partial care or aftercare and discharge.

The 1975 consent decree is as follows:*

ORDER

AND NOW, this 4th day of April, 1975, upon consideration of the agreement of the parties as to proper procedures and regulations for implementation of this Court's Opinion and Order of July 11, 1974, it is hereby ORDERED and DECREED:

1. The regulations attached hereto as Exhibit A shall be fully adopted by the Defendant Secretary of Public Welfare Frank Beal, on behalf of the Department of Public Welfare, and said regulations shall be published as immediately effective in the Pennsylvania Bulletin within fifteen (15) days. Within twenty (20) days, Defendant Beal, and his counsel, Marx Leopold, shall certify under oath to this Court that such adoption and publication has occurred.

2. The Defendants Beal, Clarke and Shoemaker shall arrange for payment to the named Plaintiff, Elvira Vecchione, in full the sum of $1,253.85, representing the

* The regulations published in the *Pennsylvania Bulletin* on April 14, 1975, pursuant to this order have not been included.

sum wrongfully withheld from her, within ten days. Within fifteen (15) days, said defendants and their counsel, Marx Leopold, shall certify to this Court under oath that such payment has taken place.

3. Defendant Frank Beal, Secretary of the Department of Public Welfare, shall order, within fifteen (15) days, the Directors and Revenue Agents of every state mental institution and facility to determine and report to Defendant Beal the names and addresses of all present and former patients whose funds and property were withheld under 50 P.S. §4424 or applied to their maintenance under 50 P.S. §4501 since July 11, 1974, and, in addition, the amounts withheld or applied to maintenance for each such patient or former patient. The Defendant Beal shall obtain and forward these reports to the Court and all plaintiffs' counsel within sxity (60) days of this Order.

4. Within ninety (90) days of this Order, Defendant Beal shall assure that all such amounts withheld under 50 P.S. §4424 shall be accounted for and that all such amounts applied to maintenance under 50 P.S. §4501 shall be paid back to the patients or former patients, including interest earned. Such payment shall be accompanied by a full statement of account to all such patients and former patients. Within one hundred (100) days of this Order, Defendant Beal, and his counsel, Marx Leopold, shall file with this Court and all plaintiffs' counsel a statement certifying under oath the names, addresses, amounts withheld or applied to maintenance and amounts paid back to each former or present patient.

5. Plaintiff Walter Buress' uncontested motion to intervene is hereby granted and Defendant Beal shall arrange for payment to Walter Buress of the full sum

wrongfully withheld from him since July 11, 1974, such payment to be made within ten (10) days. Within fifteen (15) days, Defendants Beal, and his counsel, Marx Leopold, shall certify to this Court under oath that such payment has taken place.

6. The failure to accomplish any of the above acts by the time specified, or the failure to file required certifications with the Court, shall be considered Contempt of this Court and will, after hearing, subject contemnors to fine or other appropriate sanction. The Court shall retain jurisdiction of this matter until the parties shall have fully complied with the terms of this Order.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

No. 73-162 Civil Action

Elvira Vecchione,

Plaintiff

v.

Helene Wohlgemuth, et al.,

Defendants

Walter Buress, individually and on behalf of all others similarly situated,

Plaintiff-Intervenor

v.

Frank Beal, et al.,

Defendants

ORDER

AND NOW, this 13th day of January, 1977, it is hereby ORDERED that the foregoing opinion be transmitted to the United States Court of Appeals for the Third Circuit as a certified supplement to the record in this matter.

By the Court:
(s) Edward R. Becker
Edward R. Becker, *J.*

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 76-2631

Elvira Vecchione & Walter Buress and all other persons similarly situated

vs.

Helene Wohlgemuth, Secretary, Department of Public Welfare, Commonwealth of Pennsylvania, Franklyn R. Clarke, M.D., Superintendent, Philadelphia State Hospital at Byberry, Elwood N. Shoemaker, Revenue Agent, Philadelphia State Hospital at Byberry,
Frank Beal, et al., defendants,

Appellants

(D.C. Civil No. 73-162)

Appeal From the United States District Court for the Eastern District of Pennsylvania

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Argued March 29, 1977
Before Van Dusen, Gibbons and Garth, *Circuit Judges*

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(10) OPINION OF THE COURT (Filed Jun 14 1977):

Norman J. Watkins, Deputy Attorney General; Allen C. Warshaw, Deputy Attorney General; J. Justin

Blewitt, Jr., Deputy Attorney General, Chief, Civil Litigation

Robert P. Kane, Attorney General, Department of Justice, Capitol Annex, Harrisburg, Pennsylvania 17120

David Ferleger, Esquire, 2321 Sansom Street, Philadelphia, Pennsylvania 19103

Judy Greenwood, Esquire, 3156 Kensington Avenue, Philadelphia, Pennsylvania 19134

Jonathan M. Stein, Esquire, Sylvania House, Juniper and Locust Streets, Philadelphia, Pennsylvania 19107

Attorneys for Appellees

GIBBONS, Circuit Judge

This case involves an appeal from a denial of a motion, pursuant to Fed. R. Civ. P. 60(b), to vacate a consent decree. *Vecchione v. Wohlgemuth,* 426 F. Supp. 1297 (E.D. Pa. 1977). The consent decree was entered in settlement of a contempt proceeding against certain officials of the Commonwealth of Pennsylvania, who defied an injunctive order of a three-judge federal district court. That injunctive order, which is not before us for review, resulted from a fully litigated case. We affirm the denial of the Rule 60(b) motion.

On January 19, 1973, Elvira Vecchione filed a complaint on her own behalf and on behalf of a class consisting of patients in Commonwealth mental hospitals who were not adjudicated incompetent to manage their own property. The gravamen of the complaint was that sections 424 and 501 of the Pennsylvania Mental Health

and Retardation Act of 1966, 50 P.S. §§4424 and 4501, were unconstitutional as applied to the plaintiff class, in that the statutes permitted the Commonwealth to take their property in satisfaction of costs of care or maintenance without a prior or subsequent hearing on the correctness of the Commonwealth's assessment. The statutory scheme was alleged to violate the equal protection clause of the Fourteenth Amendment, in that it permitted such appropriation of the property of competent patients, while it required notice to and hearing for guardians of adjudicated incompetents. It was also alleged to violate the due process clause as interpreted by the Supreme Court.[1] Since the complaint sought injunctive relief against enforcement of a statute of statewide application a three-judge district court was convened. On February 12, 1973, Marx S. Leopold, Esq. appeared for the defendants, and filed a motion to dismiss the complaint for lack of jurisdiction and failure to state a claim upon which relief can be granted. Thereafter, Assistant Attorney General Leopold participated in litigation of the case in the district court. Eventually the plaintiff prevailed.[2]

The district court order provided:

> "And Now, this 11th day of June 1974, It Is Ordered, Adjudged and Decreed that:
>
> 1. Section 424 of the Mental Health and Mental Retardation Act of 1966, 50 P.S. §4424, is un-

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[1] *See* North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975); Fuentes v. Shevin, 407 U.S. 67 (1972); Bell v. Burson, 402 U.S. 535 (1971); Goldberg v. Kelly, 397 U.S. 254 (1970); Sniadach v. Family Finance Corp., 395 U.S. 337 (1969).

[2] Vecchione v. Wohlgemuth, 377 F. Supp. 1361 (E.D. Pa. 1974).

constitutional on its face and as applied in violation of the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution to the extent that it denies: (a) plaintiff and other patients who are not adjudged incompetent adequate notice and opportunity to be heard before taking control of these patients' assets under 50 P.S. §4424 and/or appropriating such assets under 50 P.S. §4501; and (b) plaintiff and other patients with assets of $2,500 or less the protection of their assets that a guardian or a court would provide if they were adjudged incompetent under the Incompetents' Estates Act of 1955, 50 P.S. §3101 et seq.

2. The defendants are enjoined from applying 50 P.S. §§4424 and 4501 in the unconstitutional manner set forth above.

3. The Commonwealth shall restore to plaintiff all of plaintiff's monies held or taken by the Commonwealth or its agents from October 29, 1971, to April 6, 1973, when plaintiff was hospitalized at the Philadelphia State Hospital at Byberry." (Appendix at 150a [68a-69a herein]).

No appeal was taken from this final judgment, and no Rule 60(b) motion has been addressed to it, despite the fact that it provided for repayment of money.

Seven months later a patient, Walter Buress, alleging that he was a member of the class protected by the decree, moved to intervene. He contended that in defiance of the decree the defendants were continuing to take his social security benefit checks without a hearing, and to apply the proceeds toward what they thought he owed for care and maintenance. He moved to have the defendants held in contempt of court. On March 13, 1975, the district court issued an order directing the defendants and their attorney, Assistant Attorney General Marx S. Leopold, to show cause why they should not be held in contempt.

In fact the court's judgment had never been implemented. Instead, Commonwealth officials had continued to appropriate, without a hearing, social security checks of competent mental hospital patients amounting to several millions of dollars.

The original injunctive decree was merely negative in terms. It prohibited reliance on the existing statutory scheme, but left the Commonwealth free to design an appropriate due process substitute. But until one was designed it was clear that the agents of the Commonwealth were required to cease taking the patients' property. They did not. Faced, in the contempt proceeding, with the prospect of a coercive contempt decree, the defendants negotiated with the attorneys for the plaintiff class and with the district court, and on April 4, 1975 entered into a stipulation and order as follows:

> And Now, this 4th day of April, 1975, upon consideration of the agreement of the parties as to proper procedures and regulations for implementation of this Court's Opinion and Order of July 11, 1974, it is hereby Ordered and Decreed:
>
> 1. The regulations attached hereto as Exhibit A shall be fully adopted by the Defendant Secretary of Public Welfare Frank Beal, on behalf of the Department of Public Welfare, and said regulations shall be published as immediately effective in the Pennsylvania Bulletin within fifteen (15) days. With-

in twenty (20) days, Defendant Beal, and his counsel, Marx Leopold, shall certify under oath to this Court that such adoption and publication has occurred.

2. The Defendants Beal, Clarke and Shoemaker shall arrange for payment to the named Plaintiff, Elvira Vecchione, in full the sum of $1,253.85, representing the sum wrongfully withheld from her, within ten days. Within fifteen (15) days, said defendants and their counsel, Marx Leopold, shall certify to this Court under oath that such payment has taken place.

3. Defendant Frank Beal, Secretary of the Department of Public Welfare, shall order, within fifteen (15) days, the Directors and Revenue Agents of every state mental institution and facility to determine and report to Defendant Beal the names and addresses of all present and former patients whose funds and property were withheld under 50 P.S. §4424 or applied to their maintenance under 50 P.S. §4501 since July 11, 1974, and, in addition, the amounts withheld or applied to maintenance for each such patient or former patient. The Defendant Beal shall obtain and forward these reports to the Court and all plaintiffs' counsel within sixty (60) days of this Order.

4. Within ninety (90) days of this Order, Defendant Beal shall assure that all such amounts withheld under 50 P.S. §4424 shall be accounted for and that all such amounts applied to maintenance under 50 P.S. §4501 shall be paid back to the patients or former patients, including interest earned. Such payment shall be accompanied by a full statement of account to all such patients and former patients. Within one hundred (100) days of this Order, Defendant Beal, and his counsel, Marx Leopold, shall file with this Court and all plaintiffs' counsel a statement certifying under oath the names, addresses, amounts withheld or applied to maintenance and amounts paid back to each former or present patient.

5. Plaintiff Walter Buress' uncontested motion to intervene is hereby granted and Defendant Beal shall arrange for payment to Walter Buress of the full sum wrongfully withheld from him since July 11, 1974, such payment to be made within ten (10) days. Within fifteen (15) days, Defendant Beal, and his counsel, Marx Leopold, shall certify to this Court under oath that such payment has taken place.

6. The failure to accomplish any of the above acts by the time specified, or the failure to file required certification with the Court, shall be considered Contempt of this Court and will, after hearing, subject contemnors to fine or other appropriate sanction. The Court shall retain jurisdiction of this matter until the parties shall have fully complied with the terms of this Order.

Exhibit A, attached to the consent order, was a comprehensive set of regulations to be adopted by the Pennsylvania Department of Public Welfare as a means of implementing the original decree. They were personally approved by defendant Beal, Secretary of Welfare, and approved as to legality by the Pennsylvania Department of Justice. They were then duly promulgated in the Penn-

sylvania Bulletin on April 19, 1975.[3] A certification of the publication was, in accordance with paragraph 1 of the consent order, filed with the Court. The certification also disclosed that repayments had been made to Vecchione and Buress, the named plaintiffs.

Under paragraph 4 of the consent decree the defendants were obliged to account for sums wrongfully taken in violation of the original decree and to have those sums repaid within ninety days. The accounting produced the startling information that the Commonwealth had helped itself to 9.1 million dollars. It soon became clear that despite the decree the fiscal agents of the Commonwealth had no intention of returning the money. On July 9, 1975, six days after the money should have been repaid, under the terms of the consent order, the defendants filed in the district court the first of a series of proceedings, a petition for extension of time and a petition for clarification. These petitions were signed "Marx S. Leopold, General Counsel, Department of Public Welfare." The attorneys for the class responded with a motion for civil and criminal contempt, pursuant to paragraph 6 of the consent order. On September 8 and November 13, 1975, the district court held pretrial conferences on the contempt motion.[4] These were the first of many efforts by the extraordinarily patient District Court to encourage compli-

[3] Mr. Leopold testified that the Pennsylvania Legislative Reference Bureau would not accept for publication a document such as the proposed regulations without a cover sheet signed by a specifically designated member of the Justice Department.

[4] Apparently as a result of these pretrial conferences monies were transferred out of general appropriations to a segregated account identified by patient name and amount due under the consent decree. (270a).

ance and thereby avoid the necessity of imposing sanctions on the defiant officials.

A new complication was introduced in the enforcement picture when on December 30, 1975, the Honorable Alexander F. Barbieri, Pennsylvania Court Administrator, informed the Attorney General of Pennsylvania that he was advising the Pennsylvania courts not to entertain the proceedings which were specified in Exhibit A to the consent decree and which had been duly promulgated as Regulations of the Department of Public Welfare. Judge Barbieri's letter, quoted in the margin,[5] took

[5] Dear Attorney General Kane:

• • •

Your letter of December 17, 1975 again raises the question of the responsibility of the Pennsylvania judicial system to conduct an estimated 9,000 individual hearings under the directives of the Opinion and Order in *Vecchione v. Wohlgemuth*. My examination of the circumstances involving residents in the class envisioned in *Vecchione* suggests that safeguards sought could be adequately found for most residents in present or revised auditing procedures rather than by an individual due process hearing in every case. Furthermore, neither any of the courts, nor this Office under my authority as Court Administrator of Pennsylvania, has been named as a party originally, or subsequently joined as a necessary party to the *Vecchione* matter, in order to provide for the Judiciary of Pennsylvania an opportunity to present its views as to the merits of plaintiff's arguments and as to the potential hearing burden that has been placed on an already overtaxed judicial system. Consequently, without such an opportunity to be heard, the Pennsylvania courts are unwilling to accept such an unforseeable and ex parte hearing responsibility imposed by the Federal Court.

We can appreciate your desire to move forward with filing the required petitions, but must decline to entertain the processing of such petitions. Our court systems simply lack the manpower, the facilities, and the money to undertake such an enormous

the position that the judicial system of Pennsylvania had no duty to abide by an order arising from proceedings to which it was not a party, and concluded:

> Without wishing to appear presumptuous it would appear that a petition in *Vecchione* by your Office to reconsider and revise might be in order.

Whether or not the Attorney General considered the advice to be "presumptuous," he decided to act on it. On

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hearing responsibility. Further, despite our discussions with you about the possibility of promulgating a new Supreme Court rule authorizing appointment of masters to conduct the mandated hearings, no such rule has been or will promulgated because we lack the financial resources to fund such a mastership system.

Furthermore, the Pennsylvania Judiciary plans to seek intervention in the case of *Kremens v. Bartley*, now on appeal by your Office to the United States Supreme Court, wherein a ruling will be sought on the questions of (a) whether the Pennsylvania court systems without being joined and without an opportunity to be heard, may be called upon in a District Court Order to comply with an overwhelming judicial hearing responsibility, and (b) whether or not the District Court should abstain pending State Court proceedings on issues such as those presented in *Vecchione* and *Kremens*.

Accordingly, this Office will have no alternative but to advise the trial courts of Pennsylvania to hold in abeyance any petitions which may be filed pursuant to the *Vecchione* decree until the United States Supreme Court has provided guidance by its determination in *Kremens*. It is our legal contention that the judicial system has no duty to abide by an Order arising from proceedings to which it was not a party.

Without wishing to appear presumptuous, it would appear that a petition in *Vecchione* by your Office to reconsider and revise might be in order.

Very truly yours,
Alexander F. Barbieri
Court Administrator of Pennsylvania

February 12, 1976 he filed a Rule 60(b) motion to vacate or modify the consent decree of April 4, 1975. The motion was not addressed to the original final judgment of June 11, 1974. Indeed the Commonwealth conceded, in paragraph 19 (219a), that the court's litigated decision on the unconstitutionality of §§424 and 501 was not merely final, but correct. It advanced three reasons for vacating the contempt proceeding consent decree:

> 1. That Marx Leopold and Cecil Maidman were not authorized to consent to it.
>
> 2. That no one other than the state legislature was authorized to waive the Commonwealth's Eleventh Amendment immunity, and the Commonwealth intended to keep the 9.1 million dollars.
>
> 3. That the parties to the contempt proceeding misunderstood the status of the state officer, who in taking the checks, was not acting pursuant to the challenged Pennsylvania statutes, but pursuant to the Federal Social Security Act.

Turning to the first reason for vacating the consent decree, we note at the outset that the Deputy Attorneys General presently appearing in place of Marx Leopold and Cecil Maidman did not contend before the district court, and do not contend here, that Leopold and Maidman either lacked authority to appear in the action for the individual defendant state officers, or that they lacked authority from those individual defendants to consent to the decree and thereby avoid sanctions. Moreover, neither in the district court nor in this court do the Deputy Attorneys General handling the case contend that the authority of the actual defendants, as distinguished from their attorneys Leopold and Maidman, was exceeded in

agreeing to the consent decree. Since the suit was brought against the individual defendants on the authority of *Ex Parte Young,* 209 U.S. 123 (1908), an inquiry into the authority of Leopold and Maidman with respect to the Commonwealth would seem to be beside the point. They apparently were authorized by the defendants for whom they appeared in the contempt proceeding. The state does not allege that those defendants lacked authority to settle the contempt proceeding by arranging to purge themselves of their prior disobedience of a concededly valid judgment.

We recognize that for eleventh amendment purposes the *Ex Parte Young* type suit is a legal fiction, and that as a practical matter the original injunction did bind the Commonwealth. Indeed, the appellants do not contend that the Commonwealth is not bound by the judgment. Instead, they take the position that having disregarded its provisions they, as individual defendants in a contempt proceeding, can accept the benefit of counsel furnished by the Commonwealth, authorize such counsel to appear for them and negotiate a consent decree to avoid sanctions, and later assert that they can have the consent decree set aside, because although they authorized it and partly complied with it their attorneys lacked authority from a nonparty, the Commonwealth. Between the individual defendants and the district court the issue was not counsels' authority to act for the Commonwealth, but the defendants' responsibility to obey the court's judgment. As paragraph 6 of the consent order makes clear, the district court was not concerned with the defendants' authority either. That paragraph indicates that if they failed to make restitution they would be in contempt. Where the money came from to comply with the restitution ordered in paragraph 4 of the order was their problem, not the court's.

The appellants would have us hold that for purposes of the authority of Leopold and Maidman, the contempt proceeding was actually against the Commonwealth, while for purposes of the eleventh amendment the long participation of those attorneys in the suit was not a waiver of the Commonwealth's immunity. Even if we accept the proposition that Leopold and Maidman were appearing not for the actual contemnors but for the Commonwealth, the contention that they lacked authority to consent to the April 15, 1975 order is not persuasive. The uncontradicted testimony of Mr. Leopold is that he had specific authority from J. Shane Creamer, Attorney General, to handle the Vecchione litigation on behalf of the Department of Welfare. According to the testimony, no limitation on that authority was communicated to him or to his clients in that Department. When the contempt proceedings began, Leopold discussed it with defendant Frank Beal, Secretary of Welfare, who authorized him to attempt to negotiate a resolution which would avoid a contempt hearing. Leopold understood, based on his prior authorization from the Attorney General and the way the office was conducted, that he had authority to try to resolve the motion for contempt in some amicable way. He had in the past, as general counsel to the Department of Public Welfare, signed various stipulations and consents which resulted in substantial amounts of money being expended by the Commonwealth or an agency.

The Department of Justice, of which the Attorney General is the head, has authority "[t]o furnish legal advice to . . . officers of the State Government, concerning

any matter or thing arising in connection with the exercise of the official powers or the performance of the official duties of . . . such . . . officers," 71 P.S. §292(a), and "[t]o supervise, direct and control the legal business of every administrative department . . . of the State Government." 71 P.S. §292(b). It also has the power and duty "[t]o represent any . . . officer . . . in any litigation to which the Commonwealth or such . . . officer may be a party . . . ." 71 P.S. §293(b). Section 292(b) implies that the Department of Justice has the exclusive power to compromise and settle lawsuits against the Commonwealth. *See Commonwealth, Dept. of Public Welfare v. UEC, Inc.*, 19 Pa. Comm. Ct. 461, 338 A.2d 730 (1975). This suit, however, was not against the Commonwealth, but against the officers personally. The Commonwealth has not, in any statute which has been called to our attention, prohibited individual defendants, sued for violations of the federal constitution, from taking steps to protect themselves from individual liability by bringing to an end their offending conduct. We need not in this case consider whether as a matter of due process the Commonwealth could do so.

The Attorney General, recognizing that his department does have authority to enter into stipulations and consent decrees, urges that by regulation he has limited the authority of the Commonwealth attorneys acting under his supervision. Regulations adopted June 7, 1974, 4 Pa. B. 1145, 37 Pa. §141.51-52 provide:

> §141.51 Scope
>
> *The procedure set forth in §141.52 of this Title* (relating to stipulations or consent decrees covered) *are established for review and approval of settlement*

> *of suits for injunctive relief* against the Commonwealth. Such settlements include stipulations between the parties, stipulations with the approval of the court or consent decree.
>
> §141.52 Stipulation or consent decrees covered.
>
> The following stipulations or consent decrees shall be approved before execution by the Attorney General, or in his absence, by the First Deputy Attorney General:
>
> (1) if it is agreed, conceded, or stipulated that a provision of the Pennsylvania Constitution, a state statute or a state regulation of statewide effect is unconstitutional;
>
> (2) if the effect of any stipulation or decree shall result in expenditures by the State, either in administrative costs or direct payments to beneficiaries of the stipulation or decree, in excess of $1,000,000 or
>
> (3) if the relief granted through stipulation or decree is unique, unusual, or such that it would be uncertain that a court would order such relief should plaintiff win on the merits. (emphasis added)

The regulations do not apply, of course, to the litigated decree, which finally determined the Commonwealth's obligation to refrain from taking inmate social security checks without due process. Moreover, it is at least questionable whether §141.52(2) literally applies to the obligation to return inmate funds unlawfully appropriated. Those funds are not "administrative costs or direct payments to beneficiaries." They are the property of the inmate. And in any event, the obligation to restore the

funds rests on the individual contemnors. What steps they must take to obtain such restoration is a matter between them and the Commonwealth, not between the district court and the Commonwealth. Whatever limitation the Attorney General has placed upon his deputies respecting stipulation or settlement in suits directly against the Commonwealth, that limitation is not in terms applicable when the Attorney General undertakes the representation of individual defendants in an *Ex parte Young* type suit.

In addition, there is the question of the Attorney General's authority under state law to adopt the quoted regulation. No Pennsylvania statute confers rulemaking authority on the Attorney General. Pennsylvania follows the general rule of administrative law that where there has been no express grant of rulemaking authority, a rule pronouncement serves as a statutory interpretation and is not binding on a court. *Pennsylvania Human Rights Comm'n v. Uniontown Area School District,* 455 Pa. 52, 76, 313 A.2d 156, 169 (Pa. 1973); *Pennsylvania Human Rights Comm'n v. Norristown Area School Dist.,* 342 A.2d 464, 467 (Pa. Comm. 1975). We are not informed what statute the regulations purport to interpret; perhaps 71 P.S. §293(b). But it seems to us that one cannot interpret a statute authorizing the Attorney General to represent officers sued as individual defendants to be a grant of authority to prevent them from settling other than on his terms. The defendant officers, not the Attorney General, are facing the prospect of coercive incarceration or other sanctions.

Finally, it seems to us that the question of scope of authority of an attorney appearing and litigating in a forum must, ultimately, be a question of the law of that

forum, federal or state. In this contempt proceeding in a federal forum, for the vindication of an unchallenged final federal judgment we have no hesitation in saying that Leopold and Maidman had authority not only to appear and defend on behalf of the individual defendants, but also to negotiate a settlement on their behalf and to consent to the April 4, 1975 order. That authority was amply confirmed when the Department of Justice approved the adoption and promulgation of the regulations provided for in paragraph 1 of the order, when the defendants repaid the funds belonging to plaintiffs Vecchione and Buress, and when the Secretary of Welfare took other steps to implement the decree. No suggestion of any lack of authority in the attorneys appearing for the contemnors was made from April 4, 1975 until February 12, 1976. Clearly the lack of authority contention is a mere afterthought which cannot be entertained by any forum charged with the responsibility of discharging its judicial business with finality.

We turn, then, to the appellants' eleventh amendment argument. That argument is predicated upon *Edelman v. Jordan,* 415 U.S. 651 (1974), which held that *Ex parte Young* did not authorize a decree requiring the payment of past benefits out of the state treasury. But *Edelman v. Jordan* quite explicitly left intact the authority of federal courts to enter prospective decrees having fiscal consequences to a state treasury as the necessary result of compliance. 415 U.S. at 667-68. Thus, as appellants concede, the original litigated decree was and remains unchallengeable. What they seek to draw from *Edelman v. Jordan,* then, is the proposition that while the original judgment prohibiting the appropriation of patient funds without a hearing was perfectly valid under *Ex parte*

Young, they were free to disregard it with impunity and could, when challenged, plead that by paying over the misappropriated funds to the state they obtain the protection of the eleventh amendment.

A necessary corollary to such a proposition, of course, is that the original decree was a mere advisory opinion, subject to effective revision by the unilateral action of the defendants. But federal court injunctions against state officials who violate federally protected rights are not, despite slogans like "comity, equity and federalism," mere precatory admonitions. *See Mayberry v. Maroney,* 529 F.2d 332, 335 (3d Cir. 1976). They are enforceable by coercive contempt proceedings, which act upon the persons of the defendants. Indeed, *Ex parte Young* was before the Supreme Court on habeas corpus after an adjudication that Attorney General Young was in contempt of such an injunction.[6] Similarly, the April 14, 1975 consent order acted upon the persons of the defendants, and did not, in our view, implicate the eleventh amendment. It is true that as a practical matter the defendants could not purge themselves of contempt unless the Commonwealth fiscal authorities cooperated by returning the property of the hospital inmates. But *Edelman v. Jordan* and *Ex parte Young* cannot coexist if the former permits the effective defiance of a decree authorized by the latter. The power to remedy contempt must remain.

Moreover, looking upon the contempt proceeding as one directly against the Commonwealth, and paragraph 4 of the April 4, 1975 order as one directly binding on it rather than on the persons of the defendants, the Commonwealth must be held to have waived its eleventh amendment immunity from federal civil process by appearance.

> It is well established that the defense of sovereign immunity from suit in a federal court may be waived. E.g., Missouri v. Fiske, 290 U.S. 18, 24 (1933). A general appearance in litigation in a federal court may be such a waiver. Clark v. Barnard, 108 U.S. 436, 447-448 (1883).

Skehan v. Board of Trustees, 501 F.2d 31, 41 (3d Cir.); *vacated on other grounds,* 421 U.S. 983, *on remand* 538 F.2d 53 (3d Cir. 1976). *Edelman v. Jordan, supra,* recognized that the eleventh amendment defense could be asserted for the first time on appeal. But in this case neither the original judgment nor the consent decree in the contempt proceeding was appealed. Neither order was void. If, as the cases indicate, eleventh amendment immunity from suit in a federal court may be waived, that waiver must be deemed to have become final at the latest when the resulting judgment has become final. Otherwise a judgment in a suit in which the state appears and litigates would, as we said with respect to the suit against the officers, be a mere advisory opinion.[7] Here the eleventh amendment contention was not made until almost a year after the time for appeal from the April 4, 1975 order had expired.

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[6] Cf. United States v. United Mine Workers, 330 U.S. 258, 289-95 (1947).

[7] Thus we disagree with the holding in Jordan v. Gilligan, 500 F.2d 701 (6th Cir. 1974) that a claim of sovereign immunity can be raised by a Rule 60(b)(4) motion at anytime. *Cf.* Chicot County Drainage District v. Baxter State Bank, 308 U.S. 433 (1940); United States v. United States Fidelity & Guaranty Co., 309 U.S. 506 (1940); Boskey & Braucher, Jurisdiction and Collateral Attack, 40 Colum. L. Rev. 1006 (1940).

Our conclusion that the April 4, 1975 decree was a valid and effectual judgment brings us to the appellants' last point, that the district court erred in denying their Rule 60(b) motion for relief from it. As we said in *Mayberry v. Maroney, supra*, 529 F.2d at 335 (Commonwealth officers ignored the provisions of a federal court judgment), Rule 60(b)

> provides for extraordinary relief and may only be invoked upon a showing of exceptional circumstances.

Of the six grounds listed in the rule, only (1) mistake, inadvertence, surprise or excusable neglect (4) the judgment is void, or (6) any other reason justifying relief from the operation of the judgment are arguably relevant. We have held that the judgment is not void. The appellants' argument that there was a "mistake" (in that the defendants, though they thought they were taking the checks as state officers, were really acting under the Social Security Act), is frivolous. Their status as state officers acting under the challenged Pennsylvania statutes was established by the initial litigated decree, which they do not even now contest. Moreover the district court, in the hearing on the Rule 60(b) motion, found that the state fiscal officers continued to act pursuant to the challenged state statutes. We can add nothing to the district court's treatment of the contention about the Social Security Act except our endorsement of it. As to "other reasons," none are advanced except the unwillingness of the Commonwealth to return the 9.1 million dollars and the unwillingness of the Pennsylvania courts to entertain proceedings which would meet due process standards. These are unpersuasive reasons, especially viewed in light

of the absence of a challenge to the judgment establishing both that the present Pennsylvania statutory proceedings violate due process and that the 9.1 million should not have been taken pursuant to those procedures.

The most striking omission from the appellants' argument for relief from the April 4, 1975 order is any suggestion as to an appropriate disposition of the underlying contempt proceeding if it is vacated. The only appropriate disposition, if the order were to be vacated, would be to proceed with the contempt and sanctioning of the contemnors until the harm flowing to the plaintiff class from their disobedience of the original judgment was remedied. That is already provided for in paragraph 6 of the consent order. In these circumstances the district court did not abuse its discretion in denying appellants' Rule 60(b) motion.

The judgment appealed from will be affirmed.

TO THE CLERK OF THE COURT

Please file the foregoing opinion.

Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 76-2631

Elvira Vecchione & Walter Buress and All other persons similarly situated

vs.

Helene Wohlgemuth, Secretary, Department of Public Welfare, Commonwealth of Pennsylvania, Franklyn R. Clarke, M.D., Superintendent, Philadelphia State Hospital at Byberry, Elwood N. Shoemaker, Revenue Agent, Philadelphia State Hospital at Byberry
Frank Beal, et al., defendants,

Appellants

(D.C. Civil No. 73-162)

On Appeal From the United States District Court
for the Eastern District of Pennsylvania

Present: Van Dusen, Gibbons and Garth, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel March 29, 1977.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed October 8, 1976, be, and the same is hereby affirmed. Costs taxed against appellants.

Attest:
Thomas F. Quinn
Clerk

June 14, 1977

(11) THE MENTAL HEALTH AND MENTAL RETARDATION ACT OF 1966, 50 PA. STAT. ANN.

* * * * * * *

§4424. Funds of persons admitted or committed to State operated facilities

Where no guardian has been appointed for a mentally disabled person admitted or committed to a State operated facility all money and other personal property of such person shall be handled in the following manner, unless the director determines that such person's recovery or well-being will be promoted by his own handling of such money or personal property:

(1) The authorized agent of the Department of Revenue ~~shall,~~ without application to any court, take custody of, receive and manage in accordance with this section any money or other personal property in such person's possession at the time he is admitted to a facility and any gifts, legacies, pensions, insurance payments, retirement benefits or payments, old age and survivors' insurance, or any other benefits or payments to which such person covered by the provisions of this act may be entitled.

(2) The revenue agent shall, upon the director's request, turn over to the director the sum of one hundred dollars ($100) to be used as such person's petty cash fund. Funds so held by the director shall be disbursed at his discretion to promote the welfare of such person. The revenue agent shall, upon the director's request, restore the balance in each such person's petty cash fund to one hundred dollars ($100). For special purposes, the

director may request funds for such person up to five hundred dollars ($500).

(3) Unless a guardian has been appointed and qualified, the revenue agent shall hold, apply and dispose of all funds in accordance with regulations promulgated by the department.

(4) Whenever the money and other personal property of such person exceeds two thousand five hundred dollars ($2,500) in value, the revenue agent shall request the Department of Justice to apply for the appointment of a guardian of such person's estate in accordance with the act of February 28, 1956 (P.L. 1154), known as the "Incompetents' Estates Act of 1955."

(5) When such guardian has been appointed and qualified pursuant to this section or in any other manner, he shall be entitled to receive from the revenue agent all money and other personal property in the custody of such revenue agent belonging to the person for whom he has been appointed guardian. All funds transmitted to the guardian shall be accompanied by a statement certified as true and correct and setting forth, in detail, a full accounting of such person's funds.

(6) Whenever such money and other personal property exceed two thousand five hundred dollars ($2,500) in value and the court rules that a guardianship is not appropriate, then such money and other personal property shall be handled in accordance with this section.

(7) The revenue agent and the director each shall at all times have on file with the Secretary of the Commonwealth a bond at least equal to the total value of all such money and other personal property in his possession.

(8) The revenue agent and the director shall each open interest bearing accounts in federally insured banks, banking institutions, trust companies or savings and loan associations and shall deposit therein all such moneys in their possession. Amounts on deposit in such accounts shall not exceed the amount of federal insurance coverage. All interest earned on such accounts less costs of administering such accounts shall be allocated to each individual person's account in the same proportion that said account bears to the total of all accounts at the time the interest is calculated.

(9) All moneys and other personal property of any mentally disabled person admitted or committed to a State operated facility which is held by the director or revenue agent at the time this act becomes effective shall be managed in accordance with the provisions of this section after said date. This paragraph shall not apply to interest that is accrued on such person's funds prior to the effective date of this act.

(10) Upon the death of any such person the director shall transfer to the revenue agent all money and other personal property belonging to such person. The revenue agent shall continue to serve as provided in this section, with respect to any sums due such person as of the date of his death, or as burial allowances. After the payment of burial expenses and satisfaction of such person's obligation to the Commonwealth, the balance of such funds, if any, shall be disposed of in accordance with existing statutes governing decedents' estates except those veterans' benefits which by federal law are to be returned to the United States.

§4501. Liability of mentally disabled persons

Whenever public funds are expended under any provision of this act on behalf of a mentally disabled person, the governmental body expending such funds may recover the same from such person subject to the regulations of the department and for this purpose liability is hereby imposed upon such person admitted, committed or otherwise receiving any service or benefit under this act for all costs, payments or expenditures with reference thereto, including but not being limited to the costs of admission or commitment, transportation, treatment, training, maintenance, complete care, partial care or aftercare and discharge.